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REPORTS OF CASES

HEARD AND DETERMINED

BY

THE JUDICIAL COMMITTEE,

AND

THE LORDS

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL,

ON

APPEAL FROM THE SUPREME AND SUDDER DEWANNY
COURTS

IN

THE EAST INDIES.

BY EDMUND F. MOORE, ESQ.,

BARRISTER-AT-LAW.

VOL. VIII.

1859—61.

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OF THE
JUDICIAL COMMITTEE
OF
HER MAJESTY'S MOST HONOURABLE
PRIVY COUNCIL,

ESTABLISHED BY THE 3RD & 4TH WILL. IV., C. 41,
FOR HEARING AND REPORTING ON APPEALS TO HER MAJESTY
IN COUNCIL.

1859—61.

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The Marquis of *Lansdowne*, formerly Lord President (deceased).

The Earl *Lonsdale*, formerly Lord President.

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The Right Hon. Sir *James William Colvile*, Knt., late Chief Justice of the Supreme Court at Calcutta.

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CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

SUMBHOOLALL GIRDHURILALL - - - Appellant,

AND

THE COLLECTOR OF SURAT AND } Respondents.*
 NUSSERWANJEE PESTONJEE - - }

*On appeal from the Sudder Dewanny Adawlut at
 Bombay.*

Grant—Tora garas—Nature and characteristics—Alienability—Interest—Award of—Practice.

Toras garas, an annual fixed money payment in the nature of black mail, is alienable, and subject to sale or mortgage like other property.

Under an execution sale in satisfaction of a decree, *Tora garas* was sold. The purchaser paid the money into Court, which was paid out to the judgment creditor, and the purchaser had a conveyance of the *Tora garas* executed by the Court. The Government in the first instance acquiesced in the sale, but afterwards refused to register the name of the purchaser in their books as alienee, on the ground that *Tora garas* was, from its nature, and on public policy, inalienable; nevertheless they received and applied the accruing payments to their own use. In a suit brought by the purchaser against the Government and the judgment creditor, the *Sudder* Court in the first place held the sale illegal, on the ground of the inalienable character of *Tora garas*; and

In this case the question at issue related to the claim of the Appellant to a certain interest in land in

13th, 16th,
 19th, &
 20th July,
 1859.

* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan.

Assessor,—The Right Hon. Sir Lawrence Peel.

B

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secondly, acting upon the maxim, "*caveat emptor*," refused to order the judgment creditor to return the purchase-money. Upon appeal such decree reversed by the Judicial Committee by reason,—

First, that *Tora garas* was alienable, and capable of being attached and sold in satisfaction of a decree; and

Secondly, that the decree was erroneous, as it would be manifestly unjust to deprive the purchaser of the purchase-money in the event of the sale being treated as a nullity.

Although the amount at issue was under Rs. 5,000, the appealable value, a special appeal was admitted by the *Sudder Dewanny Adawlut* from a decree of the *Zillah* Court. The sitting Judge upon the appeal, acting under the Act, No. III. of 1843, then in force, amended the certificate of the points at issue in the proceedings before the *Zillah* Judge by adding further points. Upon the proceedings coming before the full Court of the *Sudder Dewanny Adawlut* that Court ordered the certificate to be further amended. After these proceedings had taken place, Act, No. XVI. of 1853, was passed, whereby the Act, No. III. of 1843, relating to special appeals, was repealed. By section 3 of the Act No. XVI. of 1853, power was given to the *Sudder Dewanny Adawlut* to determine appeals without reference to the points certified. Held, that under that Act, the whole subject at issue at the last hearing upon appeal was open to the *Sudder* Court's consideration.

Decree appealed from reversed with all the costs the purchaser had been put to in the proceedings in *India* and upon appeal. The costs of the execution creditor ordered to be paid by the purchaser, and charged by him in his costs against the Government.

The purchaser was kept out of the annual payment for upwards of twenty years, the Government being in receipt of the *Toras garas*. Held further (in the absence of evidence that such annual payments had been paid into Court) that the purchaser was entitled to simple interest at the rate allowed by the Courts in *India* on the arrears due when the suit was brought, and on each subsequent payment when it accrued due.

Guzerat in *Bombay*, called *Tora garas huk* (a), which he had purchased at an execution sale by the Sheriff,

(a) In *Guzerat*, in the Presidency of *Bombay*, before that Province came, at the beginning of the present century, under the dominion of the British Government in *India*, predatory marauders were in the habit of plundering the villages; and, as the ruling power was not strong enough to afford protection against such attacks, the villagers entered into agreements with the robbers to pay them a species of black mail, as the price of their refraining from plunder, and also as the purchase of their assistance in case the villages were attacked by other depredators. These payments were called "*Tora garas*," and the recipients were styled *Grassias*. *Garas* is defined in *Wilson's Glossary* to be "a hereditary claim to a small portion (a mouthful) of the produce of a village or villages by various *Rajpoot* chiefs, granted them by the local Government in remunera-

made under a decree of Court of *Surat* ; or, in the alternative, if the sale could not be sustained, a further question arose, whether the purchase-money paid by him into Court ought not to be refunded.

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The principal points raised in the Court below and at issue in the appeal were, first, whether a *Tora garas huk* (a species of hereditary local tenure in *Bombay*) was subject to attachment and sale by the Sheriff, like other species of property, in execution of a decree of a Civil Court ; secondly, whether the Government Collector, who received from the villagers and paid to the proprietors of the *Tora garas* periodically the money in respect thereof, was justified in refusing to register the name of the Appellant as purchaser and transferee, and to pay him the money received ; and, thirdly, whether in the event of the first question being decided in the negative, and the second in the affirmative, the Appellant as purchaser at the Sheriff's sale of the *Toras garas huk*, had any claim for reimbursement against the Respondent, *Nusserwanjee Pestonjee*, the execution creditor, out of the nett proceeds of the sale paid to him by the Sheriff in satisfaction of the decree passed in his favour in a suit brought by him against the then *Grassia*.

The facts of the case were as follows:—

The Respondent, *Nusserwanjee Pestonjee*, having in the year 1839, obtained a decree against one *Bharmulsungjee Kooversungjee*, in the Court of the

tion of military service, and commuted for a pecuniary payment out of the revenue paid by the villagers." A fixed payment made to military and predatory chiefs in *Guzerat* and *Malwa*, especially in lieu of lands held by them, or in purchase of their refraining from plunder.

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Principal *Sudder Ameen* of *Surat*, for the sum of Rs. 12,145, applied, pursuant to the provisions of Reg. IV. of 1827, ch. xiv. of the *Bombay Code of Procedure*, sec. lxiii., clauses 1, 2, for the attachment and sale of certain *Tora garas*, of the *Pergunnah* of *Orpad*, amounting to Rs. 347. 13 a., which belonged to *Bharmulsungjee Kooversungjee*. An application was afterwards made to the Court by *Bharmulsungjee Kooversungjee* to stay the sale for six months, to enable him to make an arrangement to discharge the decree, but the Court declined to make any order. The property was accordingly attached, and proclamation having been made, without any adverse claim having been preferred, the *Tora garas* was sold by auction to the Appellant, for the sum of Rs. 3,430, which amount he paid into Court. The Judge of the Court thereupon executed the usual instrument of sale, dated the 23rd of *January*, 1840, assigning the *Tora garas* to the Appellant, and the *Nazir* of the Court paid over the purchase-money to the Respondent, *Nusserwanjee Pestonjee*, in accordance with the ordinary practice.

The Collector of *Surat* being in receipt of the revenue of the *Pergunnah* of *Orpad*, out of which the *Tora garas* was payable, the Appellant to complete his purchase and enable him to receive the *Tora garas*, applied to him to order the *Mamlutdar* to enter the Appellant's name as the owner of the *Tora garas*, and to pay the same to him yearly. Upon this, an order was issued by the Collector as requested; but the *Mamlutdar* having made a report to the Collector that the *Tora garas* ought not to have been taken from *Bharmulsungjee*, the Appellant's

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name was not entered as owner, nor was the *Tora garas* paid over to him, the amount being paid into the Government treasury.

The Appellant, on the 22nd of *July*, 1840, presented a petition to the Judge of the *Zillah* Court of *Surat*, for redress, upon which the Judge ordered a communication to be addressed to the Collector to enter the Appellant's name as the owner thereof, and to pay the same to him accordingly. The Collector, however, reported to the Revenue Commissioners that the Appellant's purchase-money should be refunded to him, with interest, out of the public treasury, and that the *Tora garas* should be appropriated to Government, or that the Appellant's name should be entered as the owner of it. The Appellant then applied to the Revenue Commissioners, when he was informed, in reply, that a reference had been made to Government on the subject, and that an answer would be communicated on receipt of the final orders of Government. The Appellant having been at last informed by the Collector of *Surat* that his remedy was to file a suit to substantiate his claim, appealed to the *Sudder Dewanny Adawlut* of *Bombay* for redress; but on the 28th of *February*, 1843, that Court likewise left it to the Appellant to file a suit on the civil side of the Court to establish his right.

Accordingly, on the 16th of *October*, 1843, the Appellant filed a plaint in the *Zillah* Court of *Surat*, against the Respondents, insisting that *Tora garas* had been repeatedly sold, and that the purchasers were in the enjoyment of the produce thereof, and praying that the Collector might be ordered to enter the *Tora garas* purchased by the Appellant, amounting to the yearly sum of Rs. 347. 13 a., in his

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name, according to the Bill of sale, and to pay him the arrears accrued for the preceding four years, amounting to Rs. 1,391. 4 a., or, that if it should appear to the Court, that the Respondent, *Nusserwanjee Pestonjee*, caused the *Tora garas* to be improperly sold, then that he might be ordered to refund to the Appellant the sum of Rs. 4,821. 4 a., being the amount of the purchase-money and interest for four years.

The Collector of *Surat* by his answer alleged, that from the origin of *Tora garas*, the *Grassia* people used to levy certain *Huks* and necessities from the cultivators, in order that they should not oppress the villagers by plundering, &c. : and that it was the pleasure of the cultivators whether they paid the same or not ; that they did not receive that *Huk* by means of an order on the part of Government, or by means of any *sunmuds*. That after the English Government took the country, an agreement was entered into that the *Grassias* were to receive the *Huk* from the Government treasury and not from the villagers, in order that the villagers should not suffer any oppression ; and that the custom had hitherto been to pay the *Huk* to the *Grassias* alone. That the Government had not agreed to pay the *Huk* to any one else, for, by so doing, the agreement made by the Government would be broken ; because, if the *Grassias* got nothing to eat, they would again begin to plunder ; that the Government would then suffer loss, and the villagers would suffer oppression. That the Government had settled the personal property of the *Grassias*, and, if that property did not reach them, the claim of the Government to the same existed ; that, even if *Tora garas* had been sold as alleged in the plaint, the right

of the Government was not done away with, because it was agreed to pay the *Huk* to the *Grassias* alone.

The Respondent, *Nusserwanjee Pestonjee*, by his answer admitted the material facts stated in the plaint, and submitted that he was improperly made a party to the suit, and that it was contrary to the Regulations to sue him ; for as the Appellant had admitted that the *Tora garas* was regularly sold, he should have sued the Collector alone to recover the amount of it which had been paid into the Government treasury.

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The Appellant replied to both answers, stating that if any objections to the sale had appeared to the Collector, he should have filed a suit as soon as the property was attached, and have caused the sale to be stayed according to the provisions of the Regulations ; and that not having done so, the objection that the *Tora garas* was not saleable ought not now to be entertained ; and, in answer to the objection of the Respondent, *Nusserwanjee Pestonjee*, stated that so long as the Appellant's name was not entered in the books of the Collector, the Appellant's claim against the Respondent, *Nusserwanjee Pestonjee*, was valid, as he had caused the *Tora garas* to be sold, and had received the purchase-money, and that when judicial sales were avoided, the Court always directed the purchase-money to be refunded to the purchaser, whereupon the decree, for the satisfaction of which the property was sold, remained in force.

Evidence was adduced on behalf of the Appellant, which established that judicial sales had been made of other *Tora garas* in the *Pergunnah* of *Orpad*, one of which had been enforced in a suit in the civil Court of *Surat*, and that other sales had been recognised

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and ordered by the Collector of *Surat*. The Court having, at the request of the Respondent, the Collector, transmitted interrogatories to the Collectors of the neighbouring *Zillahs* of *Ahmedabad* and *Broach*, to ascertain the nature of the *garas* tenure in those *Zillahs*, the Collectors replied, that special arrangements had been entered into respecting *garas* rights, under which they would not be saleable. It, however, appeared in evidence, from a certificate of Mr. *Sutherland*, a former Judge of the Court of *Surat*, dated the 20th of *December*, 1836, to the Assistant Judge of *Broach*, in reply to a reference which had been made respecting the nature of *Tora garas* in the *Zillah* of *Surat*, that there were then very few instances of the attachment and sale of *Tora garas*, but that there was no doubt that where such description of property was possessed, a party having a decree against the property might attach and sell in satisfaction thereof *Tora garas*, in like manner as any other description of property, and that purchasers had been in enjoyment of the produce, receiving the same as it became due from Government; that *Tora garas*, like every other description of *garas*, was *Wuttun*, but was entirely unconnected with hereditary or any other office, and was a money payment of a fixed nature on a village.

The cause was heard on the 19th of *September*, 1845, when the acting Assistant Judge, Mr. *A. B. Warden*, by his decree, decided that a *Garas Huk* could not be enjoyed by any one but by the *Grassia* himself, for *Garas* were money payments made to *Grassias* to purchase the forbearance of plundering parties; therefore, if the *Huks* were sold and the money paid to the purchaser, then the Government had no hold

whatever on the *Grassias*, in case of their again resorting to acts of violence, and that the Court was not, therefore, justified in ordering the Respondent, the Collector, to enter the name of the Appellant in the Government books, or in causing him to pay the amount claimed by the Appellant; and with regard to the Appellant's claim on the Respondent, *Nusserwanjee Pestonjee*, the acting Assistant Judge held that the Respondent could not be made responsible, as the Appellant, previous to purchasing the *Huk*, ought to have made particular inquiries as to whether it was saleable or not.

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From this decision the Appellant appealed, and Mr. *R. Keays*, the acting Judge of the Court of *Surat*, concurring in the views of Mr. *Warden*, the Assistant Judge, on the 4th of *April*, 1846, confirmed that decree.

The matter in dispute being under Rs. 5,000; the Appellant, on the 15th of *June*, 1846, presented a petition of special appeal to the *Sudder Dewanny Adawlut* against the decree of the *Zillah* Court, alleging that he was entitled to redress under secs. 26 and 30 of *Bom. Reg. IV.*, of 1827. The petition came on to be heard on the 8th of *December*, 1847, before Mr. *Simson*, the sitting Judge, who granted, under the Act, No. III. of 1843, a certificate of admission of a special appeal, and recorded the following judgment:—
“This is a very peculiar case; the Appellant, *Sumbhoolall*, applies for one of two modes of redress, either that the Collector be ordered to instal him in certain *Tora garas huks*, with arrears for four years, now in the treasury, or that *Nusserwanjee Pestonjee* be made to refund the money paid at auction for the *Huks*, sold by order of the *Adawlut*, with interest for

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the use of the money since the sale. The arguments stated in the decrees of the lower Courts against the transfer of such *Huks* to ordinary individuals seem to the sitting Judge to be conclusive; such *Huks* cannot be diverted from the purpose of their original institution, namely, remuneration for the maintenance of the public peace of the District; but it seems irreconcilable with equity that *Sumbhoolall* should be made to lose both the *Huks* and the money also, paid for them at public auction, held by direction of the *Adawlut*, and with the sanction of the officer of Government. Either the *Huks* should be transferred or the money paid for them refunded; but the former course is not practicable. The sitting Judge does not think the maxim '*caveat emptor*' is fairly applied here by the lower Courts. A sale or deed by a Court of Justice, and allowed by the revenue authorities, must be presumed by a purchaser to be proper and legal, and the purchaser must not suffer through the error of the Court in directing the sale, in satisfaction of a decree, of *Tora garas huks*, which, from their very nature, are not saleable; and on the ground that the Order for the sale was a departure from practice."

On the 24th of *August*, 1849, the special appeal was brought on for hearing before Mr. *Le Geyt*, the then sitting Judge of the *Sudder Dewanny Adawlut*, when he made the following Order:—"The point to be tried in this case is not very clearly certified in the proceeding of the sitting Judge, Mr. *Simson*; and the Court, under the provisions of sect. 8 of the Act, No. 111. of 1843, accordingly amend it as follows:—Whether *Nusserwanjee Pestonjee*, in procuring the sale of certain *Tora garas huks*, in satisfaction of a decree held by him against the owner of such

Huks, and which have been declared to be inalienable and unsaleable, is not liable to the purchaser in the amount of the purchase-money paid by him on the faith of an auction sale by the judicial authorities of the *Zillah*."

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The case was again brought on for hearing before the full Court on the 6th of September, 1849, when the Court, consisting of Mr. John Warden, Mr. Le Geyt, and Mr. Grant, ordered the certificate to be further amended, as follows:—"To determine first, whether *Tora garas huks* are saleable by the Courts of *Adawlut*, and if so, to what extent; second, whether the Collector was justified in this case in refusing to register the transfer and act upon the sale; third, whether, in the event of the first question being decided wholly or partially in the negative, and the second wholly or partially in the affirmative, the purchaser has any, and what, claim against the execution creditor, *Nusserwanjee Pestonjee*."

The Court having remitted the case to be heard before a single Judge, it came on again to be heard before Mr. Le Geyt, but that Judge not being prepared to confirm the decision of the *Zillah Court*, referred the case back to the full Court, which Court, on the 19th of December, 1849, having heard the appeal, the Judges recorded their opinions separately; that of Mr. Bell was as follows:—"The points on which we are required to decide are, first, whether *Tora garas huks* are saleable by the Courts of *Adawlut*, and if so, to what extent; second whether the Collector was justified in this case in refusing to register the transfer and act upon the sale; third, whether, in the event of the first question being decided wholly or partially in the negative,

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and the second wholly or partially in the affirmative, the purchaser has any, and what, claim against the execution creditor, *Nusserwanjee Pestonjee*. I would answer the first query wholly in the negative, and the two last in the affirmative. I concur with the *Zillah* Judge, that *Tora garas* is a *Chakreat huk*, having been originally given as black mail to the *Grassias*, to abstain from pillage and other acts of violence to the *Ryots*, and receiving such *Huks* as *Wuttun*. I am of opinion they can only be alienated to the extent of the life interest of the party in possession of the same, in accordance with the spirit of the Court's interpretation, dated the 23rd of *February*, 1831, on sec. 20, of Reg. XVI. of 1827, but which are not saleable; and, under the above view, I hold that the Collector was fully justified in refusing to register the transfer; and, as the other Respondent, *Nusserwanjee Pestonjee*, was the means of the illegal sale taking place, he must be held responsible for the claim preferred by the Appellant, namely, the purchase-money, together with interest thereon at 9 per cent., and the whole of the costs incurred in all the Courts, with the exception of the Collector's, who, having made no objection within the term of the proclamation, should bear his own costs. Having given my opinion on the amended certificate, for I find the certificate has been amended, both before the single Judge and also the full Court, I beg to record my dissent against the procedure adopted, the same being opposed to sec. 8 of Act, No. III. of 1843, which declares, that in amending a certificate it is not lawful for the Court to receive or add any new point or points. This has, however, been done in the present instance. As the admitting authority, Mr.

Simson entertained no doubt in regard to the *Huks* in question being not saleable: this point, consequently, should not have been entered in the extract."

Mr. *Warden's* opinion was as follows:—"I concur in the view taken in this case by Mr. *Le Geyt*. When the British Government succeeded to this country, the local officers addressed themselves to the task of obtaining information on the distinctive character of each of the tenures of the country. In this way we have reached definitions of '*Enam*,' '*Surinjam*,' '*Meeras*,' &c., in the *Deccan*, which are generally acknowledged to be correct; and in like manner it may be presumed that the nature of the *Tora garas* possession was made the subject of inquiry before it was included in the 'List of tenures' which the law recognized, and particularly specified as tenures recognized by the custom of the country; and so far from its having been shown that there is any peculiarity in this tenure, divesting it of the usual incidents of property, the weight of evidence on the record, supported by the published opinions of such men as Mr. *Elphinstone* and Sir *John Malcolm*, is, as it appears to me, against the decisions of the lower Courts, that this tenure is not saleable. I am of opinion, therefore, that the decree of the lower Court should be set aside."

Mr. *Le Geyt* also recorded his opinion in these terms:—"In respect to the first point, whether *Tora garas* are saleable or not, I am of opinion, that there is no evidence on the record to show that the *Tora garas* property, the subject-matter of this suit, is held on any tenure which takes it out of the nature of private property. There is evidence to show that such property has been sold. Unless it can be clearly shown that property is held on a tenure in which

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the alienation by the holder is guarded against by a special provision, I think no Court of Justice can declare such property not alienable for the purpose of paying the debts of the holder, on the principle that as the possession gave him a credit, so it would be manifestly unjust, without sufficient cause and undoubted authority, to declare it not so available. The authorities cited, in support of the property being in the nature of private and prohibited property, are opinions of Mr. *Elphinstone*, 'Parliamentary Papers Review,' 1832, pp. 605, 625 and 627 ; Sir *John Malcolm's* 'Central India,' vol. 1, pp. 508 and 509, and Mr. *Sutherland* (*vide* Letter recorded, Nos. 89, 65), which must be regarded with the utmost respect. The Collector has cited neither a decision of Court, nor any authority of more than ordinary weight, than the official opinions of the neighbouring Collectors in support of his position. Therefore, I consider, that in this case it has not been proved that the *Tora garas* of *Bharmulsungjee* is exempt from the process of attachment to which all personal and real property is liable. I, therefore, do not consider the Collector justified in refusing to register the transfer, which he should be directed to do ; nor do I consider that any claim can be sustained against *Nusserwanjee Pestonjee*. All costs are to be borne by the Respondent, the Collector of *Surat*."

In accordance with the opinion of the majority of the Judges, a decree was made reversing the decisions of the *Zillah* Court, with costs in all the Courts, which were directed to be borne by the Respondent, the Collector of *Surat*.

On the 17th of *October*, 1851, the Judges of the *Sudder* Court having been changed, the Collector of *Surat* presented a petition of review to

the *Sudder Adawlut*, when a review was granted, without any reasons for so doing being recorded by the Court.

After some further proceedings, the *Sudder Court*, on the 20th of *April*, 1853, recorded the following resolution:—"The point referred to the full Court, on the 24th of *August*, 1849, was, whether the rule '*caveat emptor*' was to be applied in all strictness to *Sumbhoolall's* purchase. The full Court were of opinion that they could not decide that point until it was decided whether *Tora garas* was alienable or not; and they, therefore, amended the certificate, and added that question as another point for decision. This they had no power to do, under sec. 8 of Act, No. III. of 1843. Moreover, the very essence of the point referred showed that it had already been decided by competent authority, that *Tora garas* was inalienable. The decision of the *Sudder Dewanny Adawlut*, of the 19th of *December*, 1849, is, therefore, annulled, and the case is returned to a full Court, to determine the point referred to them by Mr. *Le Geyt*, on the 24th of *August*, 1849. All costs incurred by the Collector of *Surat* are to be borne by the original Appellant, *Sumbhoolall Girdhurlall*. The remainder of the costs are to be awarded on final decision."

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The appeal was reheard on the 16th of *February*, 1857, when the *Sudder Court*, consisting of Mr. *W. E. Frere*, Mr. *J. D. Inverarity*, and Mr. *H. Hebbert*, recorded the following resolution:—"The Court is of opinion, and decide that *Tora garas* is not alienable, and that, therefore *Sumbhoolall* took nothing by his purchase, and that his claim against the Collector must be thrown out. That *Nusserwanjee Pestonjee* guaranteed nothing, and, therefore, *Sumbhoolall* cannot come upon

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him to be reimbursed the amount of his purchase money, and that his claim against *Nusserwanjee Pestonjee* must also be rejected. The appeal is, therefore, dismissed, with all costs on Appellant.”

The value of the subject matter in dispute being under Rs. 10,000, the prescribed appealable value, a petition was presented to Her Majesty in Council by the Appellant for special leave to appeal. The Appellant submitted, that the proceedings and decisions of the *Sudder Dewanny Adawlut*, on the 20th of April, 1853, and the 16th of February, 1857, were contrary to law, as the certificate admitting the appeal in the first instance did not embrace the question, whether the *Tora garas* was saleable, and that the amendment made in the first instance in the certificate admitting the appeal was erroneous; that the amendment subsequently made was not only correct, but was necessary to raise the only points involved in the appeal; that the *Sudder Adawlut*, in ultimately deciding, in 1857, not on the question stated in the certificate as originally granted, but on that stated in the first amended certificate recognised the right of the Judge to amend his certificate admitting a special appeal, and that, therefore, the mere fact of a second amendment being made, afforded no ground for reversing the judgment of the full Court after such amendment; and the Appellant submitted, that it was competent to the *Sudder Court* to decide upon any question of law necessarily involved in the appeal;

* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. The Lord Justice Turner.

but that, if it were not competent to the *Sudder* Court to decide on hearing the cause on the 19th of *December*, 1847, that *Tora garas* was alienable, neither was it competent to the *Sudder* Court to decide on the hearing of the cause on the 10th of *February*, 1857, that the *Tora garas* was not alienable, and that the Appellant took nothing by his purchase. And it was further submitted, that the last-mentioned decision was contrary to the evidence, and the law and usage respecting *Tora garas* tenure.

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Mr. *Ayrton*, in support of the petition.

Although the subject-matter in dispute, the *Tora garas huk*, is under Rs. 10,000, the sum limited by the Order in Council of the 10th of *April*, 1838, yet the suit raises a question of great public importance in *Bombay*, respecting the right of alienation of *Tora garas*, which entitles the Petitioner to indulgence. *Spooner v. Juddoo* (a). Another suit is also pending respecting the purchase of the other *Huk*, which will be governed by this appeal.

Mr. *Wigram*, Q.C., and Mr. *W. H. Melvill*, for the Respondent, the Collector of *Surat*, resisted the application.

No question of a public character arises, special leave, therefore, ought not to be granted. Upon this principle the Court acted in the cases of *Re Harvey* (b) and *Re Sherwin* (c).

The application was granted upon the terms embodied in the following report of their Lordships. That leave be granted to the Appellant to enter and

(a) 4 Moore's Ind. App. Cases, 353.

(b) 3 Moore's P. C. Cases, 148. (c) 4 Moore's P. C. Cases, 311.

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prosecute his appeal against the Order of the Assistant Judge of the *Zillah* Court of *Surat*, dated the 17th of *September*, 1845, and against the Order of the *Zillah* Judge of the Court of *Surat*, of the 8th of *April*, 1846, and against the Orders and certificates of the Judge of the *Sudder Dewanny Adawlut* of *Bombay*, of the 8th of *December*, 1847, and of the 24th of *August*, 1849 ; and against the Orders of the *Sudder Dewanny Adawlut*, made on the 20th of *April*, 1853, and on the 16th of *February*, 1857, upon depositing, within four months from the date of the report, in the Registry of the Privy Council, the sum of £500, sterling, to meet the costs of the Respondents in the appeal, and to abide Her Majesty's decision in the cause; and the Appellant was directed to serve notice of the appeal on the Collector of *Surat*, and on *Nusserwanjee Pestonjee*, the Respondents; but their Lordships were of opinion, that the leave to appeal granted to the Appellant by Her Majesty on the above terms, was to be without prejudice to any question, whether the Orders and the certificates of the 17th of *September*, 1845, and the 8th of *April*, 1846, and the 8th of *December*, 1847, and the 24th of *August*, 1849, or any of them, were to be deemed and taken as final.

The above conditions having been complied with, the appeal now came on for hearing.

Mr. *R. Palmer*, Q.C., and Mr. *Ayrton*, for the Appellant.

It is impossible to maintain the decree of the *Sudder* Court as it now stands, as it would be contrary to the fundamental principles of justice to hold, that if *Tora garas* is a tenure of such a nature as not to be saleable, the Appellant is to be deprived of

his purchase by treating the sale as a nullity, yet that he is not to be reimbursed the amount of his purchase-money, with interest, by the Respondent, *Nusserwanjee Pestonjee*. We submit, that the decree of the Court ought to have directed the Collector of *Surat* to enter the name of the Appellant as the owner of the *Tora garas huk* in question, and to pay him the arrears; or, in the alternative, if the Court was of opinion that the *Tora garas huk* was inalienable, then that the Respondent, *Nusserwanjee Pestonjee*, ought to have been decreed to refund the purchase-money with interest. In the first place, we contend, that a *Tora garas huk* is alienable like other emoluments issuing out of land, Act, No. IV., of 1837, and, therefore, liable to be attached and sold in execution of a decree. Reg. V. of 1827, sec. 1, *Bombay Code of Procedure*, ch. I. *Tora garas* is a species of quit-rent or annual payment made to *Grassias*. The nature of this tenure was fully investigated in the case of *The Collector of Surat v. Pestonjee Rutonjee* (a), where Mr. W. E. Frere, the then Zillah Judge of *Surat*, in his judgment, expresses his clear opinion, that *Tora garas* is not a service *huk*, but was alienable and could be sold, and that so long as Government collected the *garas* from a village it was obligatory on Government to pay it to the alienee (b).

Secondly, we submit, that the Appellant's special appeal to the *Sudder Dewanny Adawlut* at *Bombay* was admissible under the *Bombay Code*, irrespective of the Act, No. III. of 1843. Even if it be determined that the provisions of the Code in that respect were repealed by the Act, No. III. of 1843, still it was competent to the Court, under the Act, No. XVI. of 1853, after having admitted the special appeal, to amend the

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(a) 2 Morris's Bom. Sud. Dew. Reps. 291.

(b) Ib. 305.

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certificate of the Judge, so as to raise the real points involved in the appeal. But further, we contend that, in no circumstances, can the legislative Acts of the Government of *India* limit or restrain the power of the Queen in Council specially to admit an appeal from a decree and proceedings of the *Sudder Dewanny*, or *Zillah* Courts. Statutes, 3rd & 4th Will. IV., c. 41, 7th & 8th Vict., c. 69, sec. 1. *Spooner v. Juddoo* (a), as the Acts, No. III. of 1843 and No. XVI. of 1853 are only binding on the Courts in India. In the present instance leave has been specially granted.

Mr. *Forysth*, Q. C., and Mr. *W. H. Melvill*, for the Respondent, the Collector of *Surat*.

As the *Tora garas huk* purchased by the Appellant is not, as we contend, alienable, no obligation existed on the Collector to enter the purchaser's name as owner in the Government books, or to pay him the rent in question. This is apparent from the very nature of the tenure, *Tora garas* being in its origin a kind of black mail, or forced contribution, to induce the *Grassias* to abstain from plundering the *Ryots*. It is very similar in its character to what formerly existed in *Scotland*. *Bell's Dict. of the Law of Scotland*, tit. "Black Mail," and authorities there collected. Report of General *Wade*. Misc. of the *Spalding Club*, p. 37. The origin of *Tora garas* and its illegal nature is explained in the minute of Mr. *Elphinstone*, dated the 15th of *August*, 1821 (b); and also by Sir *John Malcolm*, in his work on *Central India*, vol. i. pp. 508-9. *Wilson's Glossary*, voce "*Grassa*," and the case of *The Collector of Surat v. Pestonjee Rutonjee* (c), where,

(a) 4 Moore's Ind. App. Cases, 353.

(b) Par. Papers, 1832. E. I. C's. affairs rev. Vol. 2, pp. 605, 625, 7.

(c) 2 Morris' Bom. Sud. Dew. Reps. pp. 291, 319, 334, 5.

as in this case, the *Sudder Court* at *Bombay* held *Tora garas* to be inalienable, on the ground that there is an implied condition of the tenure that services should be rendered, if required, as well also as to abstain from plundering. It is admitted to be hereditary. Now, considering the nature of the tenure and its origin, it would be manifestly contrary to public policy to permit such a tax as constitutes *Tora garas* to be sold in satisfaction of a judgment debt, or even to be alienated.—[*Lord Kingsdown*: In the case of *Raja Lelanund Sing v. The Government of Bengal* (a), a *Gwatwally* tenure, or guarding the *Ghats* or passes, was upheld.]—Yes; but that case essentially differed from the present. No question there arose, as in this case, as to alienation. It was confined to a question of the right of descent to a male heir, as *Gwatwal*. But the sale must be treated as being founded upon an illegal consideration, and would, therefore, on that ground be void, *ab initio*, at Common law. *Collins v. Blantern* (b). So by the Civil law. *Just. Inst. lib. iii. tit. 20, sec. 23, "De turpi causa."* Again, as the tenure involved military and public services to be performed, and the holder could be called upon to perform them, a *Tora garas huk* was clearly not assignable. It is similar to the retiring pension of a military officer, or compensation granted to a public civil officer. *Wells v. Foster* (c), *Gibson v. The East India Company* (d), *Lidderdale v. Duke of Montrose* (e).

Next, we submit, that as far as this is an appeal

(a) 6 Moore's Ind. App. Cases, 101.

(b) 2 Wils. 341 ; and see 1 Smith's Leading Cases 154. (2nd Edit.)

(c) 8 Mee. & Wels. 149.

(d) 5 Bingh. N. C. 262. S. C. 7 Scott, 74.

(e) 4 Term Rep. 248.

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from the Orders and certificates of the *Sudder* Court, the certificate of Mr. *Simson*, of the 8th of *December*, 1847, as amended by Mr. *Le Geyt* on the 24th of *August*, 1849, was final and conclusive, and excluded from the grounds of special appeal any question affecting the liability of this Respondent. The effect of the certificate of Mr. *Simson* was to reject the appeal as against him, and to confine the ground of appeal to the claim for a refund of the purchase money as against the Respondent, *Nusserwanjee Pestonjee*. Now, the Act, No. XVI. of 1853, does not give the *Sudder* Court power to entertain the question of his liability. Neither had the *Sudder* Court, under *Bom. Reg. IV.* of 1827, power to make a second revision of the decree of the 19th of *December*, 1849; the former revision having expressly excluded all question of this Respondent's liability. The Act, No. XVI. of 1853, did not alter the rights of this Respondent on a special appeal, as, owing to the effect of the certificate as amended by Mr. *Le Geyt*, there was no question of his liability before the *Sudder* Court, which Court had in fact no power to entertain any question as against him.

Mr. *Giffard*, Q. C., and Mr. *Leith*, for the Respondent, *Nusserwanjee Pestonjee*, the execution creditor.

According to the rules and procedure of the native Courts in *Bombay*, this Respondent, as execution creditor, has been improperly made a party to the suit. No privity exists between the Appellant and this Respondent. No fraud has been alleged against him to justify the Appellant joining him with the Collector of *Surat* as a Defendant. So far as regarded this Respondent, as execution creditor, it is imma-

terial whether the *Tora garas huk* is or is not, liable to attachment and sale by the Sheriff, or whether any property passed to the Appellant by that sale, there being nothing in the facts, or by law, to distinguish the case of the Appellant from that of an ordinary purchaser at a Sheriff's sale. He virtually purchased only the right and interest of the Defendant in the original suit in the *Tora garas*, the subject of the attachment and sale. If a party buys, whether it is real estate, a chattel, or a chose in action, Courts of law and equity recognise the maxim "*caveat emptor.*" There is no fraud in the case, nor even an implied warranty of title. *Early v. Garrett* (a), *Cripps v. Reade* (b), *Thomas v. Powell* (c), *Morley v. Attenborough* (d), *Chapman v. Speller* (e). When the Appellant paid his money and got his conveyance there was an end of the matter so far as affects this Respondent, and the decree of the *Sudder Court* was, therefore, right in deciding that the Appellant had no legal claim on this Respondent in respect of the money received by him through the Court at *Surat* in satisfaction of his decree, even if the *Tora garas* be held inalienable. Another ground we insist upon is, that the Appellant ought to have appealed direct to *England* against the decree of the *Sudder Dewanny Adawlut* of the 20th of *April*, 1853, which annulled the former decree of the same Court, dated the 19th of *December*, 1849, and that it is now too late to question it.

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Mr. R. Palmer, Q.C., was heard in reply.

The case stood over for consideration.

(a) 9 Bar. & Cr. 928.

(b) 6 Term. Rep. 606.

(c) 2 Cox. 394.

(d) 3 Exch. Rep. 500.

(e) 14 Q. Ben. Rep. 621.

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Their Lordships' judgment was now pronounced by

The Right Hon. Lord KINGSDOWN.

This is an appeal from a decree of the *Sudder Dewanny Adawlut* of *Bombay*, by which it has been decided that a certain annual payment called a *Tora garas huk*, is not by law capable of alienation, and that the purchaser of this interest at a judicial sale is not entitled either to have the sale enforced, or to have his purchase-money refunded to him by the individual who has received it.

The case is one, in many respects, of a remarkable character, and it appears to their Lordships to be advisable to state the circumstances in some detail.

Tora garas huks, whatever may have been their origin, are payments which, for many years before the period of the transactions which have given rise to the present suit, had been made by the *Bombay* Government through their Collectors in the different *Zillahs* of *Guzerat*. The names of the persons receiving such payments, with the amount to be paid to them, were entered in the books of the Collector, and the payments were made according to the entries in such books out of the moneys received by the Collectors.

Amongst other such entries in the books of the Collector of *Surat*, was a sum of Rs. 347. 13a., payable out of the *Pergunnah* of *Orpad*, and which in the year 1839, was payable, and had for some years been paid to a person named *Bharmulsungjee*. This annual sum is the subject of the present suit; *Bharmulsungjee* was also in the receipt of another *Tora garas*, payable out of another *Pergunnah* within

the same Collectorate, of Rs. 883. It appears that these two *Huks* had previously belonged to a person named *Koonsurwanjee*; that he had died, leaving two widows named *Kasooba* and *Omedba*, who had succeeded to this property; that these ladies had adopted *Bharmulsungjee* as their son, and that thereupon these *Huks* had been transferred into his name in the books of the Collector.

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In the year 1839, a suit was instituted in the Court of the *Sudder Ameen* of *Surat* by the Respondent, *Nusserwanjee* against *Bharmulsungjee*, and against *Kasooba* and *Omedba*, in order to recover a debt due from these parties to that Respondent, and which debt was secured by a mortgage of the two sums of *Tora garas* standing in the name of *Bharmulsungjee*.

Pending the proceedings in this suit, *Nusserwanjee* caused a sequestration to be laid on these *Tora garas huks* in the office of the Collector of *Surat*, the nature and object of which could not but be known to the Collector.

On the 23rd of *July*, 1839, *Nusserwanjee* obtained a decree in his suit for the sum of Rs. 12,745, with interest, against the mortgaged property, and against the Defendants personally. Regulation IV. of 1827 of the *Bombay* Code of procedure directs the mode in which the attachment and sale of any of the immoveable property of the debtor against whom a decree has been obtained are to be effected. It is thereby provided, that on a petition for such sale, the property shall be distinctly specified, with the probable value thereof; that the Court, on hearing the application, shall issue such order as may be requisite towards the enforcement of the decree; that whenever a sale takes place under a decree, it shall be by public auction, after public notice, by a proclamation

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in a specified form, intimating that the property will be sold on a day named, unless the sale shall be objected to by another claimant, who, within fifteen days after the date of the proclamation, shall establish, to the satisfaction of the creditor, or of the Court, a right or interest in the property under attachment, or shall enter into an engagement to prosecute his claim within a limited time.

In order to recover the amount awarded to him by the decree in the manner pointed out in this Regulation, *Nusserwanjee*, on the 21st of *September*, 1839, presented a petition to the Judge of the *Zillah* Court, and thereby, after stating the decree which he had obtained, and the sequestration which he had issued, he prayed that the Sheriff might be ordered to attach and sell the produce of the under-mentioned *Tora garas* belonging to the Defendant, according to the usual custom.

The *Tora garas* (which included the particular sum now in dispute) was thus described:—"The Defendants, *Kasooba* and *Omedba*, used to receive the produce of the *Tora garas haks*, belonging to their husband, *Koowursungjee*, payable from the *Tannahs* of the *Pergunnah* of *Orpad* and the *Talook* of *Koorsad*. In the *Sumvut* year 1887, the said Defendants, *Kasooba* and *Omedba*, adopted the Defendant, *Bharmulsungjee*, as their son. From that day forward, the amount of the produce from the said *Pergunnahs* has been received by the Defendant, *Bharmulsungjee*. The value thereof is about Rs. 11,000."

On the same day, the 21st of *September*, 1839, an order was issued by Mr. *Herbert*, the Assistant Judge of the Court, to the Sheriff, directing him to proceed according to the usual practice, and to make a return in thirty-five days.

Under this order the *Tora garas* in question was attached by the Sheriff; proclamations of sale were issued, and the sale was fixed for the 19th of October.

Before, however, the day fixed for the sale, *Bharmulsungjee* presented a petition to the Court, praying that the sale might be delayed for six months, in order to give him an opportunity of satisfying the Plaintiff's demand, which he promised to do within six months.

The sale accordingly was stayed by an Order of the Court, till *Nusserwanjee Pestonjee* should have answered the petition. He objected to any further delay, and on the 14th of November, 1839, applied to the Court that the sale might be completed; that fresh proclamations might be issued, and that, as the property was likely to sell better at *Surat* than in the village in which it was situate, the sale might be made at *Surat*.

On the same day the Judge made an order directing the Sheriff to enter into an investigation of the proceedings which had already taken place in this matter, and to make a report, and to inquire whether there was any objection or not to selling the property in *Surat*. The Sheriff made his report, stating the proceedings which had already taken place, and that there appeared to be no objection to the sale being made in *Surat*.

On the 27th of November, 1839, Mr. *Elliott* made an order upon this report, that the Sheriff should sell the *Tora garas* of the Defendant in *Surat*, but that he should give notice of the sale of this *Tora garas* to the inhabitants of the *Zillah* in which the *Tora garas* was, as also to the inhabitants of the city of *Surat*, and should take care that no fraud or mistake was permitted to take place in the sale.

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Proclamation was accordingly issued for sale of this *Tora garas* in *Surat*, on the 24th of *December*, 1839. The proclamation required any person making any claim to the property to come in and object to the sale.

No objection was made, and on the 24th of *December*, 1839, the property was accordingly put up for sale, and the Appellant in this case was the highest bidder, and he became the purchaser of the *Tora garas* now in dispute, for the sum of Rs. 3,430. He paid his purchase-money into Court, and the amount, after deducting the expenses, was paid to *Nusserwanjee*; and on the 23rd of *January*, 1840, Mr. *Elliott*, the Judge of the Court of *Adawlut*, executed a bill of sale of the *Tora garas* to the Appellant. This instrument, after reciting the facts already stated, concluded in these words:—"Now, as you have paid that amount (Rs. 3,430) into Government, you have become the owner of the *Tora garas huk* belonging to the above-mentioned Defendant, *Bharmulsungjee*, and the right to receive the amount of the *Tora garas huk* from the *Tannah* has been vested in you. Therefore the Defendant's right to the *Tora garas huk* (Rs. 347. 13a.) has been sold for Rs. 3,430, by the Government *Adawlut*, through the medium of the *Nazir*, in conformity with the usual custom in sales by auction, in this matter, viz.: You may continue to take every year, according to the rules of the *Pergunnah*, the amount of the aforesaid allowance of *Tora garas* belonging to the above-mentioned Defendant, *Bharmulsungjee*, from the *Tannah* of *Orpad*. In so doing, there shall be no objection."

We have thought it desirable to go into this detail, because it shows very distinctly that the *Bombay* Government, through its officers, had abundant notice of

what was taking place with respect to this sale, and had ample opportunity, if it meant to object to the alienability of property of this description, to interpose to prevent it; or, at all events, to give public notice that, as far as the Government was concerned, the validity of the sale would not be recognised.

But the Government did nothing of the sort; it made no objection to the attachment of the property which its officer was to pay; and it permitted the Respondent, *Nusserwanjee Pestonjee*, to sell, and the Appellant to purchase, and the one to pay, and the other to receive, the purchase-money, without giving the least intimation to either that any obstacle would be raised to the enjoyment by the purchaser of what he had bought.

The Appellant having thus completed his purchase, applied to the Collector of *Surat* to have his name substituted for that of *Bharmulsungjee* in the Collector's books, and to have the *Tora garas* regularly paid to him accordingly. With this application the Collector seems at first to have been disposed to comply. He afterwards, however, declined to enter the Appellant's name in his book, and ordered that the name of *Bharmulsungjee* should be retained, but that the money should every year be paid to the Appellant.

The Appellant was not satisfied with this order; and on the 22nd of *July*, 1840, presented a petition to the Court in which the sale had been made, in which he alleged that other *Tora garas huks* had been sold by order of the Court, and that the names of the purchasers had been duly inscribed in the Collector's books; that all property sold through the instrumentality of the *Adawlut* is caused to be given into the possession of the purchaser, through the assistance

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of the *Adawlut*, and he, therefore, prayed that the Judge would address a letter to the Principal Collector, directing him to erase the name of this *Grasia* from the records, and to enter the *Tora garas* in the Appellant's name in the records, and to continue to pay him the amount of the *Tora garas* every year, as mentioned in the bill of sale.

On the 27th of *July*, 1840, the Judge made an Order in which, after reciting that the Appellant was the owner of the *Huk*, and that of this fact the Court had no doubt, he ordered the Sheriff to write a letter to the Principal Collector, directing that gentleman to enter the Petitioner's name in the *Garas huk* of *Bharmulsungjee*, which the Petitioner had purchased, and to continue to pay the amount of the *Huk* to the Petitioner.

Such a letter was accordingly sent, and, thereupon, the Collector seems to have communicated with the Revenue Commissioner, and to have reported his opinion, either that the *Tora garas* should be appropriated by the Government, and the purchase-money repaid, with interest, to the Appellant, or that his name should be entered in the Collector's books.

The matter, however, was referred to the *Bombay* Government, and the Appellant was informed that as soon as any decision was come to a communication would be made to him. No communication having been made, the Appellant in the year 1842, again applied to the Revenue Commissioner praying that his name might be entered in the books of the Collector, or that, at all events, the three years' arrears then in the hands of the Collector might be paid to him in order that he might not suffer loss in interest and compound interest. The answer returned to him was, that his name would not be

entered, neither would the money be paid; but that if he instituted a suit in the *Adawlut*, the money would be sent there during the lifetime of the *Grasia*, and that if he had any claim he should file a suit.

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The Appellant seems to have entertained a very natural reluctance to adopt a course attended with so much expense and delay, and the Revenue Commissioner having been soon after changed, he attempted once more to obtain redress by a petition to the new Revenue Commissioner, but without any success.

On the 21st of *November*, 1842, the Appellant presented his petition to the Judges of the *Sudder Adawlut*, stating the facts of the case, and praying either that the Collector might be ordered to enter the Appellant's name in his books, and to pay him the *Huk* regularly, or that the purchase-money which he had paid into the *Adawlut* of *Surat* might be refunded to him with interest.

This case seems to have been several times under the consideration of the Court. At length on the 28th of *February*, 1843, an Order was made by which the Petitioner was left to file a suit in the civil side of the Court.

It was under these circumstances that the Appellant filed his plaint in the Court of the Assistant Judge of *Surat* on the 16th of *October*, 1843. This suit was instituted against the Collector of *Surat*, and also against the Respondent, *Nusserwanjee Pestonjee*. As against the Collector it prayed that the *Toragaras* in question might be entered in the name of the Appellant, and that the Collector might be ordered to pay him the four years' arrears then due, amounting to Rs. 1,391. 4 a. As against *Nusserwanjee Pes-*

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tonjee, it prayed that if it should appear to the Court that *Nusserwanjee Pestonjee* had caused the *Tora garas* to be improperly sold, he might be ordered to refund the purchase-money with the profits for four years.

The Collector was authorised to defend the suit on the part of the *Bombay* Government, and he filed his answer on the 19th of *February*, 1844. He did not dispute any of the facts stated by the Appellant in his plaint. The substance of his answer was, that *Bharmulsungjee*, to whom this *Tora garas huk* had belonged, was a *Grasia*; that, before the English Government took possession of the country, the *Grasia* people used to levy certain *Huks* and necessities from the villagers as the price of their abstaining from plundering the villages; that, after the English Government took possession, an agreement was entered into with these people that they should receive this *Huk* from the Government treasury, and not from the villagers, in order that thereby the villagers should not suffer any oppression; that the custom had always obtained to pay this *Huk* to the *Grasias* only; that the Government had never agreed to pay this *Huk* to outsiders; that if the payment were made to other persons than *Grasias*, the agreement would be broken, because if the *Grasias* got nothing to eat, they would begin to plunder; that Government would then suffer loss, and the villagers would suffer oppression. Then followed this sentence, which we confess ourselves unable to understand:—"The Government have settled the personal property of the *Grasias*, and if this property does not reach them, the claim of the Government to the same is going on."

With respect to the Appellant's allegation, that *Tora garas* had been previously sold by the Courts

without any objection, the answer stated, that if this had happened, it had happened without investigation, and that the right of the Government was not done away with, because it was agreed to pay this *Huk* to the *Grasias* alone.

The Defendant, *Nusserwanjee Pestonjee*, put in an answer, insisting that his proceedings had been entirely regular, and that he was under no circumstances liable to any demand on the part of the Appellant. But the view which their Lordships take of this case makes it unnecessary for them to go into the particulars of his defence.

On the 14th of *September*, 1844, the Appellant filed his replication, in which he insisted, that if the Government had any objection to make to this sale, the Collector might and ought to have interposed to stop it, and to remove the attachment which had been previously laid upon the property, and that he was bound to adopt this course by the effect of the Regulation under which the sale had been made, and of the proclamation which had been issued in pursuance of it; that the tax of the *Huks* of the *Grasias* and of the *Moguls* used to be levied from the villages in the same way as the Government revenue; that these *Huks* were incorporated in the revenue, and that the *Tora* was fixed by the Government; that many *Tora huks*, and other *Huks*, had been sold by the Government *Adawlut*, and by the Collector; and that the names of the purchasers had been entered by the late Collector in the Government records, and the money for the same had been paid by the late Collectors, and was paid by the Defendant, the then Collector, up to this day.

There does not appear to have been any rejoinder,

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and upon this state of the record the parties went into evidence.

The Appellant proved the several proceedings which had taken place previous to the institution of the suit which have already been detailed: he proved some instances, and one in the *Pergunnah* of *Orpad*, in which *Tora garas* had been the subject of sale, and the purchaser had been put into possession of the property, and was then in possession; and he specified several other instances in which, as he stated, the same thing had been done with respect to *Tora garas*, and other *Garas huks*, and of which he alleged that entries had been made in the books of the Defendant, the Collector, and he required the production of these books, and summoned witnesses, who were record-keepers in the office of the Collector, to attend and produce these documents.

It is with great regret that their Lordships are compelled to observe that on looking at the depositions of two of these witnesses, it appears that these documents were not produced, and that it is impossible to avoid the inference that they were purposely withheld by the agents of the Government defending the suit on its behalf. It is, however, in the opinion of their Lordships, sufficiently established that up to the period of this sale these *Huks* had been the subject of sale, and had been considered and treated by the Courts of Justice and by the Government, in this Collectorate at least, as liable to be dealt with like any other species of property. That this had been done without investigation, as the Collector in his answer alleges, is certainly not the fact.

For many years before 1839, inquiries into this subject had been made by different officers of the

Indian Government. The origin and character of these payments; the question whether the Government was bound to continue them, even to *Grasias*, or was at liberty to resume them at its pleasure; the expediency of exercising that right if it existed; the question whether the *Grasia*, if he had any right to receive them, enjoyed more than a life interest, and whether such interest as he had was capable of alienation; whether the collection of these payments by the Government was voluntary on their part, and could be discontinued at pleasure, or whether they were charges on the revenue, which the Government receiving the revenue was bound to pay;—all these questions appear to have excited the attention of the Government; many of them as early as the year 1817, and to have been the subject of discussion and consideration for many years subsequently.

It further appears that in 1836, the liability of these *Huks* to sale, under the process of the Court, had come under the consideration of Mr. *Lumsden*, then Acting Assistant-Judge at *Broach*, another *Zillah* in this Province; that he had consulted Mr. *Sutherland*, a very high authority, who was then or had been Assistant-Judge at *Surat*, and that he received from that gentleman the following answer, dated the 29th of *December*, 1836:—"Sir,—In regard to your letter of the 19th instant, I have the honour to inform you there are very few instances of the attachment and sale of *Tora garas*; but there is no doubt when such description of property is possessed, a party having a decree against the property may attach and sell, in satisfaction thereof, *Tora garas* in like manner as any other description of property. *Tora garas*, like every other description of *garas*, is

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Wuttun, but is entirely unconnected with hereditary or other office, and is consequently distinct from the Regulations and Orders you have quoted. *Tora garas* is money-payment of a fixed nature on a village *jampa*, and being usually the most secure description of *garas*, would be, no doubt, of the highest value in the market.”

The Collector put in evidence, on the part of the Government, the certificates which had been returned by various Collectors as to the practice in their Collectorates, and the opinions entertained by them of the nature of these *Garas huks*; and two agreements, one entered into by Captain *Robertson* with the *Grasias* of the *Pergunnah* of *Atroleea* in the year 1818, and the other by Mr. *Crawford* with the *Thakoors* of *Dehejaun* in the year 1825; but with respect to the origin of the particular *Tora garas* in dispute, or of *Huks* of the same description in the same *Pergunnah*, no evidence was offered. The proceedings which had taken place in some suits after the institution of the present, were also put in evidence.

The case came for hearing before two Judges of the *Zillah* Court in succession, who were both of opinion that the *Tora garas* in question could not be enjoyed by any but *Grasias*; and that no decree could be made, either against the Collector or against *Nusserwanjee Pestonjee*.

It was then brought by appeal before the *Sudder Dewanny Adawlut* of *Bombay*, and after various proceedings which their Lordships do not think it necessary to go through in detail, a decree was pronounced by the *Sudder* Court on the 19th of *December*, 1849, by which the decree of the Court below was reversed, and a decree pronounced in favour of the

Appellant against the Collector, by whom all costs were ordered to be paid.

In *October*, 1851, the then Collector applied for a review of the decree: first, on the ground that according to the course of procedure then in force the question of the non-alienability of the *Tora garas* was not properly open to the consideration of the *Sudder* Court, but had been conclusively settled by the judgment of the *Zillah*; and secondly, that if such question was open, it had been erroneously decided.

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This review appears to have been granted as a matter of course, without argument or reasons assigned by the Court; but nothing was done upon it till the month of *April*, 1853. At this time all the Judges of the Court who had heard the case argued, had been changed.

It is impossible to view, without jealousy, such a proceeding as this. The Government, which appoints the Judges, and removes them at pleasure, had raised a question of great general importance, which had been decided against it. Two years elapse before any application is made to the Court for a review of the judgment, and two more years elapse before the cause is brought on for rehearing before a new set of Judges.

Upon the matter being brought before them, these Judges were of opinion that the only question open to the Court was, whether, assuming the *Tora garas* not to be alienable, which they held to have been concluded by the decree of the *Zillah* Court, any demand could be made against *Nusserwanjee Pestonjee* to refund the purchase-money. The decision of the *Sudder* Court of 1849 was reversed

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by an Order of the 20th of *April*, 1853, and the case was returned to the full Court to decide the last point.

Before, however, the cause came on again for hearing, an alteration was made in the law of special appeals by an Act of the Indian Legislative Council, which, in the opinion of the Judges, left the consideration of both questions open to them, and accordingly both questions were argued; and on the 16th of *February*, 1857, the Court pronounced the following decree:—"The Court are of opinion and decide, that *Tora garas* is not alienable, and that, therefore, *Sumbhoolall* took nothing by his purchase; and that his claim against the Collector must be thrown out; that *Nusserwanjee Pestonjee* guaranteed nothing, and, therefore, *Sumbhoolall* cannot come upon him to be reimbursed the amount of his purchase-money, and, therefore, that his claim against *Nusserwanjee Pestonjee* must also be rejected. The appeal is, therefore, dismissed, with all costs against the Appellant."

The propriety of this decree we have now to consider.

Whatever may be the nature of the payments called *Tora garas*, and the right of the *Bombay Government* to refuse to treat them in ordinary cases as the subject of sale or mortgage, like other species of property, their Lordships cannot but entertain serious doubts whether it is consistent with justice to permit the Government to raise such a defence in this case, and as against the present Appellant.

As we have observed in going through the proceedings, the Government had recognized the rights of inheritance and succession in this identical pro-

perty; it had authorized its subjects to consider that property of this description was the subject of sale; and it had had full and distinct notice of all the proceedings which took place in this particular sale. The purchase-money was paid into Court, and paid out to the creditor, and a conveyance of the property executed by the Judge of the Court to the Appellant, the Collector, that is, the officer of the Government, standing by and acquiescing in the proceedings, with full knowledge of the objection to the sale, if any objection existed.

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That, after all this had taken place, the Government should insist, and that the Court should decide, that the purchaser took nothing by his conveyance, and that he should not only lose all his purchase-money, but pay all the costs which had been incurred in his attempt to obtain redress, seems hardly consistent with ordinary notions of justice.

But, if there were not this objection to the defence, their Lordships are of opinion, that the *onus* lies upon the Government to prove that there is something in the nature of this payment which makes it incapable of alienation, and that the Government has failed to give such proof.

Of any evidence of the origin of the particular payment in question, there is no trace to be found in the case. The investigations into this subject to which we have alluded, have led persons of great learning and ability to different conclusions. It is very probable that *Tora garas huks* had not all the same origin. Assuming, however, that they all began in wrong and violence, still, that which had a vicious origin may, in course of time, have been

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legalized, since long enjoyment is itself a title, as well in favour of the recipient of an annual payment out of land, as of the possession of land itself.

The question here is, not whether the Government can be compelled to receive and hand over these sums, but, whether, actually receiving them, and having been in the receipt of them for very many years, it is entitled to say that it will not pay them to the alienee of the person to whom, but for the alienation, they would be paid.

The creditor in this case has sold, and the Appellant has purchased, such interest as the debtor had in the property sold. He will be by the transfer, in no better situation than the debtor. If this payment be conditional on the good conduct of the *Grasias* generally, or subject to any other condition; and if any circumstances should occur which would justify the Government in withholding the payment from *Bharmulsungjee*, they will equally justify the withholding it from the Appellant.

Whatever this payment may be, it clearly is not in the present case, on the evidence before us, at all analogous to the pay of a military officer, to which it was attempted at the Bar to liken it. It is not a personal payment in consideration of services to be personally performed. There is not the slightest trace of any services being claimable from *Bharmulsungjee*, and the mode in which he acquired the property seems to show that this is not the nature of the payment. The defence here raised by the Collector is not so much that the *Huk* is incapable of alienation, as that it cannot be alienated except to *Grasias*; but we are quite unable to find in the evi-

dence, or, indeed, in any other source of information to which we have had access, any distinct account of what is meant by the term "*Grasias*." They do not appear to be any distinct class or tribe. If the term be used to describe freebooters, or lawless people generally, it makes the defence a very singular one.

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Upon the whole, their Lordships are of opinion, that the Government has failed to establish its defence, even supposing such defence, under the circumstances, to be competent to it, and that the decree complained of must be reversed, and a decree pronounced in favour of the Appellant, with all the costs to which he has been put in the course of these proceedings.

With respect to *Nusserwanjee Pestonjee*, the Appellant must pay his costs, and have them over against the Collector.

A point is suggested in the appeal papers that the non-liability of this *Tora garas* to alienation had been established by the decree of the *Zillah* Court, and that this decision was not, according to the Regulations, subject to review by the *Sudder* Court.

It is unnecessary to consider whether the Order of the 20th of *April*, 1853, could be sustained as the law of procedure then stood, for however that may be, their Lordships are of opinion, that the subsequent Act of the Indian Legislature was rightly construed, and that the Court properly decided at the last hearing that the whole subject was open to their consideration.

The Appellant in this case has been kept for more than twenty years out of the possession of the annual payment to which he became entitled, and

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has lost during the whole of that time, the interest on his purchase-money. Their Lordships think that they should do justice but very imperfectly if they were to award to him only the arrears of his annuity. The Government has been in the receipt of these sums which belonged to the Appellant. In 1842, the Government undertook to pay the money annually to the *Adawlut*, if a suit were instituted ; if this had been done, and the fund has been invested, the Appellant will receive the amount. If the money has not been paid in (and we do not observe any allusion to such payment in the subsequent papers), we think that the Appellant must receive simple interest at the rate allowed by the Court on the arrears due when the suit was instituted, and on each subsequent payment as it accrued due.

Their Lordships will make a report to Her Majesty in conformity with the opinion which they have expressed.

SREEMUTTY ANUNDOMOHEY DOSSEE }
and OTHERS - - - - - } Appellants,

AND

JOHN DOE, on the demise of the }
EAST-INDIA COMPANY - - - - - } Respondent.*

On appeal from the Supreme Court at Calcutta.

Agreement—Construction—Intention—Freehold interest—Mode of creation of—Parol agreement—Sufficiency of—Tenancy—Creation—Nature and incidents of tenancy at will.

By the Hindoo law, no words of inheritance are necessary to pass the freehold of land to the heirs.

A freehold interest cannot be created by parol or by an informal written instrument.

Disputes arose between the Indian Government and an adjacent proprietor, *M. S.*, respecting a piece of alluvial land gained by accretion, of which *M. S.* was then in possession. The Indian Government required the land for public improvements. After some correspondence between the Government and *M. S.*, an agreement was entered into, by which *M. S.* undertook to relinquish all claim to the proprietary right, and to rent the land from the Government, upon condition of the latter allowing him to remain in possession until the projected public improvements rendered it necessary for him to vacate the land. Possession was given to Government, *M. S.* holding the land from the Government at a fixed rent, and undertaking to quit possession at a month's notice. Improvements in the neighbourhood having been made by the Government, and *M. S.* being dead, notice to quit was served on *M. S.*'s representatives, who refused to quit, on the ground that the improvements were not such public improvements as were contemplated by the correspondence and agreement. In ejectment by the Government, Held:—

First; that *M. S.* was, under the agreement, a mere tenant at will.

Second; that ejectment was maintainable by the Government for recovery of the land, and that *M. S.*'s representatives had no defence at law to the action.

Judgment of the Supreme Court affirmed, without prejudice to such equitable rights as *M. S.* might have under the correspondence and agreement.

EJECTMENT by the lessors of the Respondent to recover possession of two pieces or parcels of land, situate between the *Strand* road and the river

29th & 30th
Nov., 1859.

* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.

Assessor,—The Right Hon. Sir Lawrence Peel.

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Hooghly, in the town of *Calcutta* ; one piece of land containing eleven *cottahs*, and one thirty forty-fifths of a *chuttack*, bounded on the south by *Jackson's Ghaut* ; on the north by the land formerly in the occupation of Messrs. *Jessop & Co.*, and unoccupied ; on the west by the river *Hooghly* ; and on the east by the *Strand* road ; and the parcel of land containing one *beegah*, three *cottahs*, and eleven thirty-five forty-fifths of a *chuttack* ; and bounded on the south by the *Strand Mill Pucka Ghaut* ; on the north by certain lands in the occupation of *Baboo Ramohun Mullick* ; on the west by the river *Hooghly* ; and on the east by the *Strand* road.

The circumstances of the case were as follows:—

In the year 1841, the land in question, which was formed from the river *Hooghly* by accretion to the *Strand* road, was claimed by the East India Company, and by *Baboo Muttyloll Seal*, who was in possession. His right being disputed, *Muttyloll Seal* offered to lease the land from Government, so long as the Government did not require possession of the same.

In the year 1850, the Government being engaged in making arrangements with a view to improvements in connection with the *Strand* road, were, for that purpose, desirous of obtaining possession of the land on the river-bank between the *Strand* road and the river *Hooghly*. In accordance with the instructions of the Deputy-Governor of *Bengal*, Mr. *W. H. Smoult*, the then Solicitor to the East India Company at *Calcutta*, by a letter dated the 2nd of *November*, 1850, applied to *Muttyloll Seal* to surrender any right he had in the lands on the river-bank in order that he might not be an obstacle to the improvement

to be carried out ; and in reply to such letter, *Muttyloll Seal*, on the 31st of *March*, 1851, sent a letter to Mr. *Smoult*, expressing his readiness to surrender all his interest in the property on two conditions—the first being, that he should not be required to surrender the land until the Government were prepared and actually began to carry out the proposed improvement on the *Strand* road ; and the second had reference to the construction of a *Ghaut* on the banks of the river, in a manner therein mentioned.

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It appeared that upon further consideration, *Muttyloll Seal* resolved not to insist upon these conditions, and, on the 10th of *May*, 1851, he sent a letter to Mr. *A. Grant*, the then Solicitor of the East India Company, which was as follows:—"Sir,—In reference to an official letter from Mr. *W. H. Smoult*, then officiating Solicitor of the Honourable Company, of date the 2nd of *November* last, relating to the newly-formed land in front of the *Strand* Mills, of which I hold possession, I am quite ready to comply with the wishes of his Honour the Deputy-Governor, and to surrender all my interest in the property. I make this surrender in the full belief that it is the intention of the Government to reconstruct the *Strand* road ; and that to obtain this most desirable purpose, it is necessary that they should be put in immediate possession of the land which I now hold ; at the same time, I have to request that if any delay should take place, that the land which I now surrender may not in the meantime be let to other parties, or applied to any other purposes than that of a road, as it might, in such case, become a serious injury to my property immediately abutting on it to the eastward. I have also to request that the Government should

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erect and build a *Ghaut* at their own expense on the banks of the river, precisely similar to that which is now erected and built at my own expense (only extending the *Ghaut* steps to the south side), as will appear by the enclosed plan. The columns, roof, and ornamental parts of the *Ghaut* I am to be allowed to build at my own cost and expense, should the Government be pleased to approve of the above proposals. I beg to be favoured with the honour of an answer."

A copy of this letter was forwarded by Mr. *A. Grant* to Mr. *J. P. Grant*, Secretary to the Government of *Bengal*, and in conformity with the instructions of Government conveyed in a letter from Mr. *J. P. Grant*, of the 13th of *June*, 1851, Mr. *A. Grant*, on the 19th of *June*, 1851, sent the following letter to *Muttyloll Seal*:—"Sir,—I had the honour of receiving your letter of the 10th of *May* last, unconditionally surrendering your interest in the newly-formed land on the *Strand* bank of the river fronting the *Strand* Mills, and enclosing the 'plan of the Flour Mill *Ghaut*,' which letter and plan I had the honour to forward to the *Bengal* Government in copies. I am directed by the Deputy-Governor of *Bengal* to communicate to you, in reply to your letter, that his Honour is gratified by the course adopted by you. I am directed to say, you may be assured that, pending the execution of the project of the new *Strand* road, which has been for several years in the contemplation of Government, the land now surrendered by you will not be let to any other party. Respecting your request for the building of a *Ghaut* on the banks of the river, the columns, roof, and ornamental parts of which building you liberally offer to construct

at your own expense, the Deputy-Governor desires me to say that the erection of a proper number of *Ghauts*, at suitable places, is a part of the proposed plan of improvement, and the Government will gladly avail itself of your public-spirited offer when the time comes."

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On the 26th of *July*, 1851, Mr. *L. Clarke*, acting on behalf of *Muttyloll Seal*, wrote to Mr. *C. R. M. Jackson*, the then Advocate-General, as follows:—
“In Mr. Secretary *Grant*’s letter to *Baboo Muttyloll Seal*, of the 19th *June* last, it is not distinctly stated, that the *Ghaut* which the Government undertake to construct in place of that which he built, and now surrenders, will be erected on the present site. I have explained to you why this is of consequence to *Muttyloll*, and you tell me that such is the intention of the present arrangement. Will you get a few lines from Mr. *Grant* to this effect, to remedy any misconception, should there be another incumbent in his office when the new *Ghaut* may be built?”

Mr. *Jackson* showed this letter to Mr. *Grant*, the Secretary to the Government, and on the 4th of *August*, 1851, Mr. *Grant* wrote to Mr. *Jackson* a letter of that date, which was as follows:—“Sir,—With reference to the communication from Mr. *L. Clarke*, of the 26th instant, made to you on the part of *Baboo Muttyloll Seal*, which you showed to me a few days ago, and which I have laid before the Honourable the Deputy-Governor of *Bengal*, I am directed by his Honour to say, that you can assure the *Baboo* that if the bank of the river and the *Strand* road remain as at present, the *Ghaut*, whereof he has announced his desire of erecting the columns, roof, and ornamental part alluded to in my letter to the

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Company's solicitor, No. 1,235, dated the 13th ult., will be erected where the *Ghaut* upon the land of which the *Baboo* now gives up possession, at present stands ; but if, as is anticipated, a new road be made running in a line nearer to the river than the present line, the *Ghaut* will be erected on the river-bank immediately opposite the existing *Ghaut* aforesaid."

This letter was communicated to *Muttyloll Seal* and to Mr. *L. Clarke*, his professional adviser.

On the 27th of *October*, 1851, Mr. *W. H. Elliot*, the Chief Magistrate of *Calcutta*, proceeded to the premises with *Muttyloll Seal*, and possession was formally made over to Mr. *Elliot* on behalf of the Government, as proprietor of the soil, by *Muttyloll Seal*, and restored to *Muttyloll Seal* as a tenant at a fixed rent, removable at the pleasure of Government on one month's notice.

Previously to this transaction, personal interviews had taken place between Mr. *Elliot* and *Muttyloll Seal*, who had stated to Mr. *Elliot* his readiness to give up the land for "the purpose of a public road ;" an expression which Mr. *Elliot* required to be corrected for that "of any public improvement," which was acceded to by *Muttyloll Seal*.

On the 11th of *October*, 1852, *Muttyloll Seal* executed an agreement which, after reciting that a dispute had long been pending between the Government of *Bengal* on the one part, and *Muttyloll Seal* on the other part, regarding the two parcels of land in question, proceeded as follows:—"And whereas it has been declared that the Government desire the land for the purpose of public improvements ; and whereas it has been agreed between me and the Government, that on my giving up all claim to the proprietary

right and title in the land aforesaid, the Government will leave me in undisturbed possession thereof till such time as the projected improvements above alluded to shall render it necessary for me to vacate that land ; and whereas I did, in the presence of many witnesses, on the 27th day of *October* last, proceed to the land aforesaid, and then and there make over my right and title in the said land to the Chief Magistrate of *Calcutta*, on behalf of the Government, and did afterwards receive from him possession of the land as a tenant, at the rent of Rs. 10 per annum: Now, I, being in good health of body and of sound mind, do hereby acknowledge that I have no claim whatever to the proprietary right of the land aforesaid, and that I will, year by year, and *kist* by *kist*, pay on demand, the sum of Company's Rs. 10 per annum for the rent of that land ; and that when the projected improvements hereinbefore alluded to shall have been commenced, and shall have progressed so far as to render it necessary, for the further extention and continuation of such improvements, that I should vacate the said land, according to the true intent and meaning of these presents and of the agreement between me and Government, as appears in the correspondence with Mr. Secretary *Grant* relating to the subject, that then, and on receiving one month's notice to quit from the Chief Magistrate of *Calcutta* for the time being, or other officer duly authorized by Government to issue such notice, I will entirely give up and vacate possession of the said land, and remove from it all buildings and all goods and chattels of every kind whatsoever which to me and my undertenants may pertain, and will thenceforward utterly renounce all claim for myself,

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my heirs and successors, to the possession, as I have already done to the right and title of the said land."

After the date of the above agreement, the improvements were commenced, under the authority of Government; and in the course of such improvements the *Strand* road was increased in width, and the land remaining between the road and the river was macadamised, so as to form an open quay, accessible from the *Strand* road, on which goods might be landed and conveyed in *hackeries*, and so as to be available for the relief of the traffic on the *Strand* road, one of the greatest thoroughfares in *Calcutta*.

In the year 1856, the improvements on and along the *Strand* road had extended up to the land in question, and it became necessary to obtain possession of the land for the further progress of the improvements. *Muttyloll Seal*, was dead, and the Appellants, his executrix and executors, were then in possession.

On the 11th of *September*, 1856, a notice to quit at the expiration of one month from the time of service, was issued by the Chief Magistrate of *Calcutta*, and served upon the Appellants.

The Appellants refused to comply with the terms of the notice, when the East India Company brought an action of ejectment in the Supreme Court at *Calcutta*, on the plea side, against the Appellants to recover possession; and they afterwards obtained the common rule to defend their title to the land, as landlords, and a new plaint in ejectment was filed against the Appellants, who pleaded not guilty.

The action was tried before Sir *James W. Colvile*, Knt., Chief Justice; and Sir *Arthur Buller*, Knt.,

Puisse Judge. On the part of the lessors of the Respondent the evidence adduced proved, in substance, the facts and circumstances above detailed. The ground of defence set up by the Appellants was, that the "public improvements, referred to in the agreement, dated the 11th of *October*, 1852, were confined to the construction of a new *Strand* road; and that *Muttyloll Seal* thereby agreed to give up possession of the land for that purpose only; and that, inasmuch as in the course of the improvements that were being made, the land in question would not, as they alleged, be applied for the purposes of the road, they were not bound to give up possession of the land. At the conclusion of the trial the Court found and declared as a jury, amongst other things, first, that if it was part of the essence of the contract that a new *Strand* road should be made, and that the road should have attained a certain degree of progress to authorize the giving of the notice, then the Court found and declared that this had not been done, as there was clearly no road made, either in substitution or extension of the *Strand* road. Secondly, assuming that the work done on the ground which the Court were of opinion was in the nature of a wharf, was a public improvement, the Court held, that it had progressed so far as to entitle the lessors of the Respondent to demand possession of the two parcels of land, and found for the lessors of the Respondent. Thirdly, as to the agreement, the Court found that it referred to public improvements generally, and that improvements other than a new road were contemplated, and that the lessors of the Respondent were not bound to any particular improve-

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ment. The Court accordingly gave a verdict for the lessors of the Respondent.

The Appellants applied for and obtained a rule *nisi* calling on the lessors of the Respondent to show cause why the verdict should not be set aside and a new trial had, on the ground that the verdict was against evidence, and also on the ground of misdirection. The rule came on to be argued on the 13th of May, 1857, before the same Judges, and, after argument, was discharged.

The present appeal was from the verdict and judgment of the Supreme Court, and the Order made upon the rule *nisi* for setting aside the verdict.

Mr. Rolt, Q. C., and Mr. Leith, for the Appellants.

This case turns upon the construction and effect to be given to the informal instrument of the 11th of October, 1852, by which *Muttyloll Seal* agreed to give up and vacate the two parcels of alluvial land in question, coupled with the correspondence imported by express reference into that agreement. The principal question will be, whether the lessors of the Respondent have brought themselves within the terms of the agreement, so as to be entitled to eject the Appellants. Our contention is, that the Government have not constructed a public road, which we submit, was one of the conditions on which the two parcels of land were agreed to be surrendered. Except under this agreement, there is no evidence of title in the East India Company to the land. By the agreement, *Muttyloll Seal* abandoned his proprietary rights upon three conditions: first, that the land should be ap-

plied to no other purpose than the construction of a new road ; secondly, that the Government should erect a *Ghaut* upon the banks of the river at a certain place ; and, thirdly, that he should not be required to vacate possession until the works agreed to be carried out had progressed so far as to complete the new road. The terms “ projective improvements ” and “ public improvements ” mentioned in the agreement can only refer to those mentioned or projected in the correspondence. Now, there is nothing in the agreement itself which would enable it to be enforced ; the terms being too vague and too general. The Government must, therefore, stand upon their original title, and try the question whether *Muttyloll Seal*’s representatives are entitled to the land, as if no surrender had been made by him of his proprietary rights ; for, we submit, that the agreement of *October 1852* passed a freehold interest to *Muttyloll Seal* which was continued in the Appellants. The Government must certainly show that the work in progress at the date of the notice to quit was a projected improvement within the meaning of the agreement and the correspondence. Now, it was found by the Court, acting as a jury, that the work in progress was not in the nature of a road ; and, it appears from the evidence, that the construction of a new public road between the old *Strand* road and the river *Hooghly*, was the improvement contemplated and agreed on at the date of the agreement, and that such new road and a new *Ghaut* were the only improvements projected or contemplated at that period. The verdict, therefore, ought not to have been for the lessors of the Respondent. The Court ought to have directed itself, sitting as a jury, to inquire and find what particular

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improvements were projected or contemplated, and if the improvements contemplated by one of the parties differed from those contemplated by the others, then the improvement contemplated by *Muttyloll Seal*, which was the construction of the new public road, ought to have been held by the Court to be the improvement contemplated by the agreement, and this construction is clear from the correspondence, imported into the agreement by express words of reference—[Lord *Chelmsford*: Let me put the view of the case which has been suggested by one of their Lordships, and a very important one it is. *Muttyloll Seal* was a proprietor, under some sort of title to the land in question. He was a Hindoo, and he could by the Hindoo law pass land without writing. He has actually done so in this case, without delivery of possession. Now, what character was he clothed with in respect to that land? He was not a tenant from year to year, because I think the terms of the agreement show that a tenancy from year to year is excluded. He could not be a tenant at will, because a month's notice is inconsistent with the idea of a tenancy at will. A tenant at will is liable to be turned out without any notice at all. The agreement could not imply a licence to occupy the ground, because the East India Company, who must have given the licence, are a corporation, and the licence could only be given under their seal. What defence, therefore, to an action of ejectment could the Appellants have against the claim of the East India Company? If the Appellants have been induced to enter into the agreement by improper practices and suggestions, it might be set aside, or relief given in a Court of Equity ; but so far as the agree-

ment is concerned, we must look to the legal rights of the parties in ejectment. What defence then have you to the action?—The Appellants were entitled to hold possession until the public improvements had been completed and a month's notice had been given to require them to vacate. The verdict, we contend, is bad, first, as it is against evidence ; and secondly, on the ground of misdirection, that the improvements made were not the contemplated improvements, and there ought, therefore, to be a new trial.

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Mr. *Forsyth*, Q. C., Mr. *Maule*, and Mr. *W. H. Melvill*, for the East India Company.

Under the terms of the agreement of the 11th of *October*, 1852, and the correspondence therein referred to, the works in progress on the *Strand* road were public improvements within the meaning of that instrument. It was no part of the agreement between *Muttyloll Seal* and the Government, that the land should be taken by the Government, only if required for the purpose of a new road, nor was there any such understanding on the part of *Muttyloll Seal*. The purposes for which the land was required by Government were in accordance with the understanding of the parties as well as the words of the agreement. *Muttyloll Seal* must be considered as holding under a title from the Government. The surrender of such interest as he had in the land was unconditional. That being so, and the notice to quit the land in question being properly issued and served upon the Appellants, they were not justified in refusing to comply with the notice, and there was, therefore, no defence in ejectment to this action. As the verdict

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was fully warranted in law and by the evidence, it would be useless, considering the title of the Appellants to the land in question, to refer the case back for a new trial.

Their Lordships' judgment was pronounced by
 The Right Hon. Lord CHELMSFORD.

8th Dec.,
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This is an appeal upon a verdict and judgment of the Supreme Court at *Calcutta* in an action of ejectment by the lessors of the Respondent against the Appellants, and also from an Order of that Court discharging a rule *nisi* subsequently obtained, to set aside the verdict and for a new trial.

This ejectment was brought to recover two pieces of land lying between the *Strand* road and the river *Hooghly*, in the town of *Calcutta*. This land had been gained from the river *Hooghly* by accretion, and, at the time of the transactions out of which the ejectment arose, was in the possession of *Muttyloll Seal*, since deceased, as the ostensible owner. His claim was, however, disputed by the East India Company; and *Muttyloll Seal*, in the year 1841, appears to have been willing to have admitted their right to the land, for in two letters of the dates respectively of the 25th of *August* and the 4th of *November*, 1841, he proposed to take it on a lease, "or, if Government were not agreeable to that, he wished them to give him a written assurance that he was to keep possession so long as they did not require the said plots for some other purposes themselves." Whether anything took place upon these letters nowhere appears; but *Muttyloll Seal* continued in the undisturbed possession of the two pieces of land from that time down to the year 1851. The Government, for

many years before 1851, had it in contemplation to construct a new road in lieu of the old *Strand* road; and in that year the project seems to have been seriously taken up, and application was made to *Muttyloll Seal* to give up the land in question for this purpose. These two pieces of land were immediately in front of other land the undoubted property of *Muttyloll Seal*, from which they were only separated by the public highway called the *Strand* road, so that by the possession of them he and his tenants had immediate and uninterrupted access to the river. *Muttyloll Seal* had also built a *Ghaut*, with steps leading down to the river upon other alluvial land abutting on one of the two pieces of land in question.

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There can be no doubt that when application was first made to *Muttyloll Seal* to surrender the land, he believed that the project of the Government was to make a new *Strand* road, and, also, that this was the improvement originally contemplated by them. His expectation appears clearly from the first letter upon the subject, written by him to Mr. *Smoult*, the Solicitor of the East India Company, on the 31st of *March*, 1851, in which one of the conditions for which he stipulates is, that “he shall not be required to surrender the land until the Government are prepared, and do actually begin to carry out the proposed improvement on the *Strand* road.” It is true that in his subsequent letter, written to Mr. *Archibald Grant*, the new Solicitor to the East India Company, on the 10th of *May*, 1851, he does not insist upon this condition; but he states explicitly—“I make this surrender in the full belief that it is the intention of the Government to reconstruct the *Strand* road, and that to obtain this most desirable purpose

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it is necessary that they should be put in immediate possession of the land which I now hold; at the same time I have to request that if any delay should take place, that the land which I now surrender may not, in the meantime, be let to other parties, or applied to any other purposes than that of a road, as it might, in such case, become a serious injury to my property immediately abutting on it to the eastward."

What was the improvement which was contemplated by the Government at this time is shown by the answer of Mr. *Archibald Grant* to *Muttyloll Seal* of the 13th of *June*, 1851, after a communication from the Secretary to the Government, in which, treating the letter of *Muttyloll Seal* as an unconditional surrender of his interest in the newly-formed land on the *Strand* bank of the river, he adds:—"I am directed by the Deputy-Governor of *Bengal* to communicate to you, in reply to your letter, that his Honour is gratified by the course adopted by you. I am directed to say you may be assured that, pending the execution of the project of a new *Strand* road, which has been for several years in the contemplation of Government, the land now surrendered by you will not be let to any other party."

It has been observed in argument, that *Muttyloll Seal* imposes no condition upon the Government that they shall "reconstruct" the *Strand* road, but merely makes the surrender "in the full belief" that this is their intention: that although he requests that, if any delay takes place, the land shall not be applied to any other purposes than a road, as well as that it shall not be let to other parties, the letter accepting the surrender is confined to an assurance that, pend-

ing the execution of the project, the land will not be let to any other party, and that the surrender of his interest is, to his own knowledge, treated as having been made unconditionally; from all which it is inferred that *Muttyloll Seal* must have known, or at least have had strong grounds for believing, that the plan of the Government was not necessarily confined to the formation of a new *Strand* road.

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Down to this period of the correspondence, however, there does not appear to have been any other improvement in contemplation; nor was there anything to lead *Muttyloll Seal* to believe that the land in question was wanted for any other purpose than for a road.

But before the actual surrender took place, some intimation was given, which might have been sufficient to lead him (in some degree at least) to expect some alteration of the original Government scheme of improvement. In his letter to Mr. *Archibald Grant*, containing his offer to surrender the land, he says:—"I have also to request that the Government should erect and build a *Ghaut* at their own expense, on the banks of the river, precisely similar to that which is now erected and built at my own expense (only extending the *Ghaut* steps to the south side), as will appear by the inclosed plan. The columns, roof and ornamental parts of the *Ghaut* I am to be allowed to build at my own cost and expense, should the Government be pleased to approve of the above proposals. I beg to be favoured with the honour of an answer."

And, in answer, he had been told:—"Respecting your request for the building of a *Ghaut* on the banks of the river, the columns, roof and ornamental parts

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of which building you liberally offer to construct at your own expense, the Deputy-Governor desires me to say that the erection of a proper number of *Ghauts* at suitable places is a part of the proposed plan of improvement, and the Government will gladly avail itself of your public-spirited offer when the time comes."

Mr. *Longueville Clarke*, who was the adviser of *Muttyloll Seal*, on the 26th of *July*, 1851, wrote for an explanation to the then Advocate-General, as follows:—"My dear *Jackson*,—In Mr. Secretary *Grant's* letter to *Baboo Muttyloll Seal*, of the 19th of *June* last, it is not distinctly stated that the *Ghaut* which the Government undertake to construct in place of that which he built, and now surrenders, will be erected on the present site. I have explained to you why this is of consequence to *Muttyloll*, and you tell me that such is the intention of the present arrangement. Will you get a few lines from Mr. *Grant* to this effect, to remedy any misconception, should there be another incumbent in his office when the new *Ghaut* may be built?"

To which the Secretary of the Government returned this answer on the 4th of *August*, 1851:—"Sir,—With reference to the communication from Mr. *Longueville Clarke* of the 26th instant, made to you on the part of *Baboo Muttyloll Seal*, which you showed to me a few days ago, and which I have laid before the Honourable the Deputy-Governor of *Bengal*, I am directed by his Honour to say, that you can assure the *Baboo* that if the bank of the river and the *Strand* road remain as at present, the *Ghaut* whereof he has announced his desire of erecting the columns, roof and ornamental part alluded to in my letter to the

Company's solicitor, No. 1235, dated the 13th ult., ^{1859.}
 will be erected when the *Ghaut* upon the land of which SREEMUTTV
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 the *Baboo* now gives up possession at present stands;
 but if, as is anticipated, a new road be made, running DOF DEM.
 in a line nearer to the river than the present line, the THE
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Ghaut will be erected on the river bank, immediately
 opposite the existing *Ghaut* aforesaid. I have, &c.,
J. P. Grant, Secretary to the Government of *Bengal*."

This letter was not only communicated to *Muttyloll Seal*, but it is referred to expressly in the agreement of the 11th of *October*, 1852, which was signed by him after his actual surrender of the land, and which agreement was prepared by *Mr. Clarke* on his behalf.

It certainly does appear extraordinary, if it was intended that the land should be surrendered only upon condition that a new *Strand* road should be made, that they did not at once reject the idea of there being the least uncertainty upon that subject, and insist upon a literal compliance with this condition, as the price of the surrender of the land.

It is to be observed, that this letter was written nearly three months before the actual surrender, which took place on the 27th of *October*, 1851. Before this event *Muttyloll Seal* had conversations with *Mr. Elliot*; but although he states that in one of them "the *Baboo* said he would give up the land only for a public road," and *Mr. Elliot* insisted upon the alteration of the terms to any "public improvement," yet as he cannot fix the time of this particular conversation, but can only say it was "before signing the agreement B" (the agreement of the 11th of *October*, 1852), it cannot fairly be taken to have occurred before the delivery of possession.

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 However, on the 27th of *October*, 1851, Mr. *Elliot* says:—"I proceeded to the premises with *Muttyloll Seal* after the verbal agreement; possession was formally made over to me on behalf of Government, as proprietor of the soil on the 27th of *October*, 1851, by *Baboo Muttyloll Seal* in person, in presence of numerous witnesses, and restored to the *Baboo* as a tenant removeable at the pleasure of Government on one month's notice as per separate agreement; a previous day had been fixed, and it was postponed to Monday, the 27th of *October*, 1851."

Some little difficulty has arisen as to the meaning of the words used by Mr. *Elliot*, "as per separate agreement." Upon turning, however, to the evidence of Mr. *Clarke*, who was present at the delivery of possession, after speaking of the *Bengalee Kabooleat* signed at the time, he says, "There was also an agreement to be signed;" so that Mr. *Elliot*, by the words "as per separate agreement," must be understood to refer to an agreement to be afterwards made, which was to contain the terms upon which *Muttyloll Seal* was to be allowed to remain in possession. It can hardly be contended, that before this agreement was entered into, *Muttyloll Seal* had any interest in the land which could have been available against an ejectment brought by the East India Company upon the legal title acquired by his formal delivery to them.

Then, did the agreement of the 11th of *October*, 1852, place him in a better situation for resisting the enforcement of their rights in a Court of law? The Appellants contend that the proper construction of this agreement is, that they are entitled to hold possession until a month's notice has been given,

after the new *Strand* road should have progressed ^{1859.}
 so far as to render it necessary, for its further ^{SREEMUTTY}
 extension and continuation, that they should vacate ^{ANUNDOMO-}
 the land; and that although there is no express ^{HEV DOSSFE}
 mention of the road in the agreement, yet that the ^{v.}
 words “public improvements” and “projected im- ^{DOE DEM.}
 provements” hereinbefore alluded to, must be inter- ^{THE}
 preted by reference to the correspondence with Mr. ^{EAST INDIA}
 Secretary *Grant*, to mean nothing else but the new ^{COMPANY.}
Strand road.

But against this construction must be set the reference to the letter to Mr. Secretary *Grant* of the 4th of *August*, 1851, showing that the alteration of the *Strand* road was not definitively decided upon, and the conversation with Mr. *Elliot* before this agreement was signed, in which he insisted upon the general words “public improvements” being inserted, for the very purpose of preventing its being alleged that *Muttyloll Seal* had given up his land only for a public road. Now, construing the agreement by the aid which these circumstances afford, it would rather appear that whatever interest *Muttyloll Seal* had in the possession, was contingent, not upon the formation of the new *Strand* road, but upon the public improvements, of whatever nature the Government might ultimately determine to execute in this direction.

Of course, if this is the correct construction, then, even if *Muttyloll Seal*’s interest under the agreement was a legal one, it was determined by the notice given on behalf of the East India Company. But the real question upon the agreement is, whether it created any legal interest of any description. For the purpose of this consideration, let it be assumed that the “public

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improvements'' intended by the agreement, were the formation of a new *Strand* road, and that, consequently, *Muttyloll Seal's* possession was contingent upon the progress of that road. The lessors of the Plaintiff had become the absolute owners of the land, and, upon the proposed assumption, they would have let *Muttyloll Seal* into possession under an agreement that they would not disturb him until after a month from a contingent uncertain event. What was the nature of this interest? Did it create any tenancy between the parties? If so, of what description? It certainly was not a tenancy for years ; nor from year to year ; nor for a year certain; nor for a month; nor for any other certain time. In the course of the argument for the Appellants, it was suggested that the agreement passed a freehold interest, and, certainly, from the indefinite character of the interest given, it seems best to answer this description. If the agreement could have created such an interest, there being no measure assigned by years or by any portion of time, although the stipulated rent was to be payable yearly, it could be nothing less than a freehold, and a freehold which would not end with *Muttyloll Seal's* life, because, as he was a Hindoo, no words of inheritance were requisite to continue his interest to his heirs. The consequence would be, that his death not determining it, it would enure to their benefit, and have an indefinite duration till determined by a notice on the occurrence of the event contemplated. Now, an interest of this nature could not be created by parol, or by a mere writing, such as the instrument of the 11th of *October*, 1852, which, therefore, could operate only as an agreement. *Muttyloll Seal* having been admitted, or holding, under this agreement, and the same sort of possession being

continued by the Appellants, he and they after him could not be treated as trespassers, but were in as tenants-at-will ; of course, such a tenancy was determinable by the mere bringing of an ejectment.

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This appears to be the correct construction of the agreement, so far as the legal rights of the parties flowing out of it are concerned. It passed no legal interest out of the East India Company to *Muttyloll Seal*. The Company did not grant, nor did they intend to grant, as Hindoos ; if they had so intended, they must have failed in their intention, for they could only grant according to law. Yet the instrument was binding upon them as an agreement, and a Court of equity would have protected the Appellants against any attempt to dispossess them contrary to its stipulations. Notwithstanding the provision which it contains for a month's notice, the East India Company might have maintained an ejectment the day after the agreement was entered into, because it passed no legal interest, but they could have been instantly restrained from proceeding by a Court of equity.

Their Lordships, in determining this case, have confined themselves strictly to the legal rights of the parties, and have purposely abstained from expressing any opinion upon the equitable considerations which may be involved in it. They decide only that the ejectment was maintainable, and that the Appellants had no defence to it at law ; and this decision is made without prejudice to any equitable rights of the Appellants, which must be understood to be fully reserved to them.

Their Lordships will, therefore, humbly recommend to Her Majesty that the judgment of the Supreme Court of Judicature be affirmed, and this appeal dismissed, with costs.

SONATUN BYSACK - - - - - Appellant,

AND

SREEMUTTY JUGGUTSOONDREE DOSSEE - Respondent.*

On appeal from the Supreme Court at Calcutta.

Hindoo Law—Will—Construction—Bequest to idol with provision for enjoyment of “surplus proceeds” by sons—Direction to add surplus to capital and for division of surplus in case of disagreement—Bequest, if absolute—Provision for division of income if amounts to separation in status—Provision for descent in male line—Widow’s right if defeated.

Although the Courts in India recognize the power of a Hindoo to make a Will, yet the extent of the power of disposition by a Testator is to be regulated by the Hindoo law, and cannot interfere with a widow’s right to a proper maintenance.

A Hindoo by Will, gave all his moveable and immoveable property to his family idol; and after stating that he had four sons, he directed that his property should never be divided by them, their sons, or grandsons in succession, but that they should enjoy “the surplus proceeds only;” and the Will, after appointing one of the sons manager to the estate, to attend to the festivals and ceremonies of the idol and maintain the family, further directed, that whatever might be the surplus, after deducting the whole of the expenditure, the same should be added to the corpus, and in the event of a disagreement between the sons and family, the Testator directed, that after the expenses attending the estate, the idol, and maintenance of the members of the family, whatever nett produce and surplus there might be, should be divided annually in certain proportions among the members of the family. At the date of the Will the family were joint in estate, food, and worship. The accumulations of the income were divided as directed by the Will. Held,—

First, that the bequest to the idol was not an absolute gift, but was to be construed as a gift to the Testator’s four sons and their offspring in the male line, as a joint family, so long as the family remained joint, and that the four sons were entitled to the surplus of the property, after providing for the performance of the ceremonies and festivals of the idol, and the provisions in the Will for maintenance.

Second, that the fact of the division of the income arising out of the

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RAMDOSS BYSACK, a Hindoo inhabitant of *Dacca*, in *Bengal*, died in the year 1848, leaving large self-acquired estate, consisting of moveable and im-

* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.

Assessor,—The Right Hon. Sir Lawrence Peel.

Testator's estate among the members of the family after the Testator's death did not constitute a division of the family.

One of the sons of the Testator died, leaving three sons, one of whom also died without issue, leaving a widow.

Held further, that the direction contained in the Will that the property should go in the male line did not exclude the widow of the grandson of the Testator, and that the widow was entitled to a third share of a fourth part of the property and accumulation, without prejudice to her rights as a Hindoo widow when the property should be divided.

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moveable property, situate in that Province, having, on the 13th of *February*, 1848, made a Will in the Bengalee language, of which the following is a translation:—

“ Being now far advanced in age, and being about making preparations to proceed to the holy place of *Esshor Sree Brindabun*, I have (of my own free will in sound health and settled mind) with the view of making a Will of the whole of whatever properties I possess and the same being in future brought into operation specified below the distribution of all my properties which will accordingly be carried into effect. First.—Independently of my paternal concerns I having by my own earnings acquired in this district of *Dacca* and in the town of *Calcutta* &c. brick-built houses *Zemindary* and *Talooks* or landed estates and rent-free lands and Company's promissory notes and divers other mercantile transactions and cloth merchandize and gold and silver and precious stones and shawls and *roomals* &c. various self-acquired properties in my own name and in the names of my own sons and also in the fictitious names of other persons have been passing my time wherein none of my paternal property or money &c. was concerned the whole of the said properties I have obtained by my own exertions. Whatever has been produced and increased (through the means of my

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funds) by the labours of my two sons namely *Sree Krishnomungle* and *Sree Manikchund Bysack* the whole of that too being blended together has been applied to the banking and mercantile transactions &c. and the purchase of lands and tenures. The acquisitions of even the sons are ~~not~~ held separate. Second.—The whole of my aforesaid moveable and immoveable properties I have granted to *Sree Sree Joot Esshore Muddunmohun Thakoor* (the idol so called) which I have established in the house of which he is the *Malik* or proprietor. I am not indebted to any person at present. I have four sons, that is *Sree Krishnomungle* and *Sree Manikchund*, and *Sree Shamchund* and *Sree Juggurnauth Bysack* are in existence. Among these my above-mentioned properties shall never be divided and partitioned and the said sons or their offspring &c., that is to say, their sons and grandsons, heirs in succession, shall not have the power of alienating any one of my aforesaid properties by gift or sale, &c. If they do so the same shall be inadmissible before the administrator of justice and neither the whole of the above-mentioned properties nor any part thereof shall be liable to sequestration or auction sale for the debts of the heirs and successors. After my demise, my sons, grandsons, *et cetera*, heirs, shall have the power of enjoying the surplus proceeds only. Third.—From the time present my eldest son, *Sree Krishnomungle Bysack* shall as a servant of the *Esshore Thakoor* control over and manage the entire estate and maintain the members of the family and whenever and whatsoever acts and business and the ceremonies and festivals &c. of the *Thakoors* or the deities

shall occur he shall perform some according to his own discretion. Whatever may be the overplus after the deduction of the whole of the expenditures the same shall be added to my said estates and other properties, or Company's papers shall be purchased, or any mercantile speculation which may be advantageous shall be entered into therewith. Fourth.—After the death of *Sree Krishnomungle*, in accordance with the provisions specified in the 3rd clause, *Sree Manikchund Bysack* being director and performer of the divine services and manager shall exercise his control over all. In the like manner in the event of *Manikchund's* departing this life, amongst my heirs whoever may exist and be the oldest in age he shall exercise similar control and shall perform the whole of the affairs. Fifth.—Should no agreement and unanimity at all exist among my heirs then the profits of the mercantile transactions and traffics and banking and of the landed estates and rents of houses and on account of various interests of description &c. whatever money shall be received belonging to my estate from that first of all the public revenue and the charges of the interior and the expenses of the repairs of the houses being deducted whatever surplus may remain out of that the expenses of the idols and of the established and contingent affairs of the family and occasional acts and ceremonies and the expenses on account of the maintenance of the members of the family and connection &c. being deducted whatever nett-produce and overplus there may be the same being adjusted annually six *annas* portion of the said overplus money *Sree Krishnomungle Bysack* and his children and six *annas* share *Sree Manikchund Bysack* and his

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children and two *annas* share *Sree Shamchund Bysack* and his children and two *annas* share *Sree Juggernauth Bysack* and his children shall be entitled to receive having the same apportioned. With the exception of these none of my children shall have (upon any plea) the power of claiming any increased share. Should they ever do so they shall be inadmissible. In consideration of the increase of the capital fortune which has been effected by the labors of *Krishnomungle* and *Manikchund* somewhat increased shares have been given to them. None shall have any power of raising any objection thereto. And after the demise of my sons their respective male issues down to sons and sons' sons &c. heirs in succession, shall be entitled to the shares of the aforesaid amount of the surplus profits belonging to their respective fathers. And whatever portion of the father's share shall (according to the *Shastra* or Hindoo law) be lawfully due to whomsoever of the heirs he shall receive such portion of the profits. Should (owing to the non-existence of heirs in the lineage of male issue) a daughter or daughter's son be empowered to receive any share then such person shall receive a stipend which may be merely enough for food clothes and shall have no power of claiming the share of the profits. Sixth.—To whomsoever whatever *streedhan* has been given and to whomsoever whatever may in future be given that woman is the rightful owner of the same none else have any power of laying the hands of an heir thereupon. With the exception thereof all other whatever personal properties of gold and silver &c. there are, all the children shall have the power of using them with discretion

and as occasion may require and when should they be compelled to be separate then they shall receive them according to the above-mentioned proportions. Seventh.—In the event of any property out of the whole of my properties above enumerated (by becoming old or damaged have the appearance of being injured or otherwise owing to any irresistible cause) be likely to become deteriorated then the clauses above specified shall not be a bar against making a sale or exchange of such property.”

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Probate was granted to this Will by the Supreme Court at *Calcutta*.

The Testator left four sons ; *Krishnomungle Bysack*, *Manickchund Bysack*, *Shamchund Bysack* and *Juggurnauth Bysack*, and one widow, him surviving, and constituted a joint and undivided Hindoo family.

Krishnomungle Bysack died intestate in *June*, 1850, leaving three sons, the Appellant, *Sonatun Bysack*, *Hurrymohun Bysack* and *Kistodoss Bysack*, and a widow.

In the year 1849, *Hurrymohun Bysack*, one of the grandsons of the Testator, married the Respondent, and afterwards died, intestate and childless, leaving the Respondent his widow and heir him surviving.

The Respondent, then an infant, by her next friend, filed a Bill in the Supreme Court at *Calcutta*, against *Manickchund Bysack*, *Shamchund Bysack*, *Juggurnauth Bysack*, the Appellant, and *Kistodoss Bysack*. The Bill set forth the principal facts above stated, and charged that the Respondent, as the widow and legal representative of *Hurrymohun Bysack*, deceased, was entitled to an interest for life in his estate, and that such interest extended to a third of six *annas* of

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the estate of the Testator under the Will, and to a third of the estate of *Krishnomungle Bysack*, that might have accrued since the death of the Testator ; and the Bill charged that the limitation and restriction in the Will as to none but males inheriting was too remote, and, therefore, void, and that her father-in-law, *Krishnomungle Bysack*, was upon a true construction of the Will entitled to an absolute six *annas* share in the estate of *Ramdoss Bysack*, and that *Krishnomungle Bysack*. and his son were in like manner entitled to a six *annas* share of the accumulations thereof since the death of *Ramdoss Bysack*. That, even if the Court should be of opinion that the estate to which the Plaintiff's husband was entitled became divested, by his dying without male issue, still the limitations in the Will of *Ramdoss Bysack* could not in any way control or alter any of the accumulations made since his death ; that under no circumstances whatsoever could a Will operate so as to deprive a Hindoo widow of such a maintenance out of the estate of her husband as would be suitable to his means ; and the Plaintiff submitted, that although the Company's Courts, as well as the Supreme Court, had declared the power of Hindoos to make Wills, yet that such Wills must not be in derogation of any rights of parties entitled to maintenance or otherwise under the Hindoo law. And the Bill further charged that the descendants of *Ramdoss Bysack* were a Hindoo family, joint in estate, food and worship, and that no partition had ever been made of the same ; and that the disposal of the Testator's moveable and immoveable property to the idol, *Sree Joot Esshore Muddenmohun Thakoor*, was

void ; and that the restriction upon alienation contained also in the second clause was void, as tending to create a perpetuity ; and, lastly, that having regard to the whole of the Will, the trust, if any, in favour of the idol could only be construed as a trust to the extent of what is sufficient to keep up the worship of the idol in a proper and becoming manner, having regard to the position of the Testator's family ; and the Bill prayed, first, that the Will of *Ramdoss Bysack* might be carried out under the Order and direction of the Court, and that the rights of the Plaintiff and Defendants, the parties interested therein, also of the idol, might be ascertained and declared ; secondly, that an account might be taken of the estate of *Ramdoss Bysack*, at the time of his death ; thirdly, that an account also might be taken of the estate of *Krishnomungle Bysack* ; fourthly, that as far as the Plaintiff was concerned, a partition might take place, and that she might be decreed to be entitled to hold her share, whatever that may be, in severalty for her life ; fifthly, that if the Court should be of opinion that the husband of the Plaintiff was not entitled to any interest either in the estate of *Ramdoss Bysack*, or of the accumulation since his death, then that she might be declared entitled to a suitable maintenance out of the estate of *Ramdoss Bysack* and the accumulations thereof. And lastly, for an account of what amount of property was requisite to be set aside and appropriated for the due performance of the worship of the idol.

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The Defendant, *Manickchund Bysack*, and the Appellant, filed a joint answer to the Bill. The answer stated, that some accumulations were made of the income of the property left by the Testator, first by his two eldest

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sons, and subsequently to the death of *Krishnomungle* by *Manickchund* alone ; and that such accumulations, up to the death of *Hurrymohun*, in the year 1258, B.E., from the death of the Testator, amounted to a nett sum of Rs. 21,512. 2, and that further accumulations had been made since the death of *Hurrymohun* up to the end of the year 1261, B.E., amounting to the nett sum of Rs. 544,01. 3. 6, and that the accumulations made up to the year 1259, B.E., estimated at Rs. 47,792. 2. 6, had been divided among the whole of the Defendants, the Respondent having resided with them up to the last-mentioned date, and accordingly received her maintenance from them ; and that the remainder of such accumulations had been received, and were then in the possession of the Defendant, *Manickchund*, as manager and executor under the Will ; and that the descendants of the Testator had always been and still were a Hindoo family, joint in estate, food, and worship, excepting as to the Defendants, *Shamchund Bysack* and *Juggernaut Bysack*, who had become separate in food only from the other members of the joint family, and that no partition had ever been made among the descendants of the Testator of the joint estate, except so far as such accumulations up to the end of the Bengalee year 1259, which had been divided among them as aforesaid, could be called a partition ; and the answer submitted to the Court the points of law raised and charged by the Bill in regard to the rights of the Respondent, as widow and heir-at-law of *Hurrymohun Bysack*, in respect to the joint estate of the Testator, and the accumulations aforesaid: and it was by the answer contended, that she was only entitled to maintenance, which the Respondent had received

from the Defendants, as long as she had remained in their house ; and that they had all along been ready and willing and had offered to maintain the Respondent. The answer of the Defendant, *Shamchund Bysack*, was similar in its statements to the above answer. The other two Defendants, *Juggernaut Bysack* and *Kistodoss Bysack*, infants, by their guardian, filed the usual infants' answer.

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An Order was made by the Supreme Court on the 28th of *July*, 1857, with the consent of the Defendants, that the Plaintiff should be allowed Rs. 100 *per mensem* for her maintenance.

The cause was heard on the 4th of *August*, 1857, and the Court by a decretal Order of that date declared and decreed, that the Respondent, as the widow and heiress of *Hurymohun Bysack*, was entitled to a share in the estate formerly belonging to the Testator, but the Court reserved the question as to what should be the amount of such share until the Master had made his report upon the inquiries therein directed ; and the decretal Order then directed accounts to be taken of the moveable and immoveable estate of the Testator, and of the rents and profits of the immoveable estate, and of the accumulations of the moveable and immoveable estate ; and the decretal Order directed the Master to inquire and report what parts of the estate were outstanding and undisposed of, and whether any division of the accumulations, or of the surplus income of the estate, had taken place ; and between whom and in what shares and proportions, and what portion of the income of the Testator's estate had been applied in or towards the support of the family idol, or for the performance of the religious and other ceremonies connected with the worship of

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such idol ; and what provision should be made, and what part of the estate should be set apart for the future maintenance of such family worship. All further directions and the costs of the suit were reserved until after the Master had made his report.

The judgment pronounced by the Court, consisting of the Chief Justice, Sir *James W. Colvile*, Sir *Arthur Buller*, and Sir *Charles R. M. Jackson*, Puisne Judges, in making the above decretal Order was as follows:—
 “ The question in this cause is, how far the rights of the Plaintiff, as the widow and heiress of *Hurrymohun Bysack*, in the ancestral estate which was left by *Ramdoss Bysack*, her husband’s grandfather, are affected or varied by the document which is admitted to be the last Will and Testament of *Ramdoss Bysack*. The effect of the earlier dispositive clauses is to give nominally the whole of the Testator’s property to his family *Thakoor*, but not by way of a religious endowment, properly so called. On the contrary, the Testator’s plain intention is, that, subject to a proper provision for the performance of the ceremonies in favour of this idol, the amount of which seems to be left to the discretion of the managing member, his family should, as a joint Hindoo family, continue to enjoy his property, not only drawing the income from land and other fixed investments, but continuing to carry on his banking business, or embarking his capital in other mercantile speculations. It is, therefore, almost conceded, that no effect can be given to the last sentence in the second clause, which denies to the sons and other remoter descendants the power of alienation, and seeks to withdraw the property from liability to their debts, even though incurred in carrying on the trade authorized, if not enjoined, by the Testator. Such

provisions are obviously inconsistent with the nature of the interest in the property given, and with the use to be made of it. It would be strange if under colour of a bequest in favour of an idol, a man could not only enjoy property, but trade with it, without subjecting his beneficial interest in it to the just demands of his creditors. The utmost effect that can be given to such a disposition, is to treat the religious trust as over-riding the beneficial interest of the party in possession, and constituting a prior charge upon the property. Such was the view taken of a similar disposition by the late Chief Justice in his judgment in *Doe dem. Sibchunder Doss v. Sibkissen Bannerjee* (1 Boulnois, p. 72). In the fifth clause of the Will, the Testator provides for a different state of things, namely, that in which 'no agreement and unanimity at all exist among my heirs.' We are inclined to think that he meant the provisions in restraint of alienation to over-ride this clause, but contemplated a state of things in which his heirs would be unable to agree in the application of the surplus income, and would cease to enjoy it as an undivided Hindoo family. To meet that state of things, he provides that his two eldest sons by whose personal exertions the fortune had, in part, been made, and their respective children, shall each have a six *annas* share; whilst the two younger sons and their respective descendants shall each take only a two *annas* share. And this provision is followed by the clause upon which the present contention arises; the effect of which seems to us to be, that the shares so given are to pass not in the course of legal succession, but perpetually in the male line, daughters and daughters' sons being excluded and declared entitled to maintenance only. It seems to

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be agreed that this disposition, if effectual in law, would by implication, though it does not so expressly, exclude the Plaintiff who claims as widow and heiress of a childless grandson. If the question were untouched by authority, we should be of opinion that the testamentary power, engrafted upon the general Hindoo law by the custom of *Bengal*, which has been recognised and established by repeated decisions, must be taken to exist, subject to those restraints which the general policy of the law imposes on the exercise of testamentary power in general; and in particular that it cannot enable a Hindoo Testator to alter perpetually the legal course of succession to his property by making it pass for all time to those who, taking not as a legal but as substituted heirs, would, according to our phrase, take not by descent but by purchase. But, in truth we are bound to hold this, unless we are prepared to overrule the decision of the Court when presided over by the late Chief Justice in *Luckunchunder Seal v. Kooramoney Dossee* (1 Boulnois). In that case, the Court, in the first instance, dismissed the Bill of the Plaintiffs, who claimed by virtue of a disposition very similar in its terms to the present; and ultimately and on a re-hearing, upheld the disposition only in respect of the property which was to be governed by the law of the Testator's domicile; it having been proved that he died domiciled at *Chinsurah* whilst *Chinsurah* was still a Dutch Factory, and that the Roman-Dutch law which had been introduced into the settlement recognised the validity of such a disposition. It is, however, contended, that we can mould the clause so as to give effect to the Testator's intentions within the limits in which, without trenching on the rule against per-

petuities, he might alter the course of succession ; and that we ought to do so by construing the clause as one giving estates for life only to his son, *Krishnomungul*, and after him to his three sons, of whom all, including the Plaintiff's husband, are admitted to have been born in the lifetime of the Testator. But this would be a very arbitrary proceeding, and tantamount to making a new Will for the Testator. Nor do we see how it could be done according to the doctrine of *Cy-pres*, or any of the other English rules of construction which are so much discussed in the case of *Monypenny v. Dering*, supposing that authority to be applicable to the construction of a Hindoo Will. There is nothing here which in terms cuts down the interest to be taken by the grandsons to a life-estate ; and the observations of Lord *St. Leonards* in the report of *Monypenny v. Dering* (2 DeG. Mac. & Gor. 176), upon the third point submitted to him are very applicable to the argument addressed to us. Again, it is to be observed, that the gift to grandsons is a gift not to the son's, *Krishnomongul's*, nomination, but to a class of which many members might have been born after the Testator's death ; and to such a gift, if we are to decide this case by English rules of construction, the principle established by *Leake v. Robinson* (2 Mer. 363), would apply. We could not split into portions the bequest to the class, and say that those members of it who were born in the Testator's lifetime should take for life only, and that other members of the same class should take a different estate. We are, however, always exceedingly unwilling to apply the technical rules of construction derived from the English law to a Hindoo Will. We would embarrass ourselves neither with those invoked for the De-

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fendants and supposed to be supported by the case of *Monypenny v. Dering*; nor with the rule in *Shelley's* case which was called in aid by the learned Counsel for the Plaintiff. We would endeavour to collect the Testator's intention from the terms used by him; and then consider, whether it is within the testamentary power, limited, as we think that must be by the general policy of the law. We cannot see that the Testator has made any distinction between his grandsons, his great-grandsons, or the remoter descendants comprised in the terms, 'et cetera heirs.' All are to inherit their ancestor's share according to the *Shasters*, or Hindoo law, modified only by the exclusion of the females or the descendants of females. Therefore, the object which he has in view is to create for his own property as long as he has any descendants in the strict male line, a new course of descent. That object is, we think, beyond the scope of the testamentary power recognized by law, and must, therefore, fail. The only other admissible construction would be one which would confine the operation of the provision in question to the demise of the sons (the first takers). But on that, as upon the former construction of the Will, *Hurymohun* would take an interest in his grandfather's estate which is descendable to the Plaintiff as his widow and heiress. The remaining question is, what is the amount of her share? On her part it is contended that she is entitled to one-third of six-tenths. On the other side it is contended that if the disposition contained in the fifth clause fails in part, it must fail altogether, and that she can claim only one-third of one-fourth. It appears to us that the disposition in favour of the two elder sons may well take effect,

although the attempt to make the shares descend otherwise than according to the course of legal descent has failed. The inequality of the shares is altogether independent of the manner in which they are limited to descend. The intention which dictated the one disposition is wholly distinct from the intention which dictated the other. We have had more doubt whether this division was to take effect, except in the case in which no agreement and unanimity should exist among his heirs; and, therefore, whether, if it appeared that his sons and grandsons had continued in all respects a joint and undivided Hindoo family, the widow of a grandson could come in and insist, under this clause, upon having a larger share than that which the law would have given her had the Testator left his estate to descend to his sons in equal shares. It is, however, suggested in the answer, though not proved, that there has been a partial division of the accumulations, and that the *status* of the family is not exactly that of an undivided Hindoo family. We think it desirable before we finally decide to what share the Plaintiff is entitled, to ascertain by the inquiries which we shall direct, what, if anything, has been done under the clause in question."

Some time after this decree, *Manickchund Bysack* died intestate, and, by an Order of the Supreme Court, the suit was revived against *Koonjobeharry Bysack*, *Goverdhone Bysack*, *Choytundoss Bysack*, *Shadoochoorn Bysack*, and *Gobind Doss Bysack*, his sons and heirs.

The present appeal was brought from the decretal Order of the Supreme Court of the 4th of *August*, 1857.

No appearance having been put in for the Respondent, the appeal was heard *ex parte*.

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Mr. *R. Palmer*, Q.C., and Mr. *Leith*, for the Appellant.

As the parties to the suit are Hindoos, the Court below was bound to decide the questions of law raised according to the principles of Hindoo law and usage in force in *Bengal*. By Statute, 21st *Geo. III.*, c. 70, the Hindoo law is made a part of the law of *Bengal*. This proposition is admitted by the Court in their judgment in establishing the power of a Hindoo in *Bengal* to make a Testamentary disposition of real and personal estate, ancestral or self-acquired, a fact which cannot now, whatever doubt formerly existed, be questioned, as the Courts in *India* and this Tribunal have recognized such a power. *F. Macnaghten's* "Cons. on the Hindoo Law," pp. 77, 316, 331 and 361. *Strange's* "Hindoo Law," vol. i, p. 254, vol. ii, p. 438 (Edit. 1830). *W. H. Macnaghten's* "Princ. of Hindoo Law," p. 34. *Juggomohan Ray v. Sreemutty* (a), *Rewun Persad v. Mussumat Radha Beeby* (b), *Mullick v. Mullick* (c), *Baboo Janokey Doss v. Binabun Doss* (d), *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick* (e). It is true this proposition was admitted by the Court in their judgment, yet the Court in establishing the Will in fact, though perhaps inadvertently, indirectly applied to it the peculiar doctrines of the English law against perpetuities; doctrines of a technical character, and not founded on any principle of general jurisprudence. But, we insist such a doctrine is unknown to the Hindoo law, as it is, reasoning by analogy to the Civil law prevailing in *Holland* or *Scot-*

(a) Clarke's Rules and Orders of Sup. Court of Calcutta, p. 105.

(b) 4 Moore's Ind. App. Cases, 137.

(c) 1 Knapp's P. C. Cases, 245.

(d) 3 Moore's Ind. App. Cases, 197.

(e) 6 Moore's Ind. App. Cases, 526.

land. No rule of English law, which is *jus positivum*, is to be applied for convenience' sake, to restrict or restrain the operation of the Hindoo law. It cannot be urged that, because the English law in *Bengal* is administered to British-born subjects, there is any reason to apply its technical rules to Hindoos. As the Supreme Court was dealing with the Will of a Hindoo, the limitations contained in that instrument ought to have been considered by the Court without reference to the doctrine of the English law against perpetuities. But, assuming that the Will is to be construed with reference to the particular doctrines of English law regarding perpetuities in a limitation under a Will, the devise, we submit, is not too remote, and the Court ought to have construed the Will as giving estates for life to *Krishnomungle Bysack*, and after him to his other three sons, who were all, including the Respondent's husband, born in the Testator's lifetime. Now, if the sons took only a life estate, how could the Respondent's husband take more than a life estate? The true question really is, whether it was a good bequest to the idol. The Testator's moveable and immoveable estates are by the Will settled on the family idol by way of religious trust. An endowment for religious objects is valid by the Hindoo law, and will be carried into effect by the Courts in India. *Elder widow of Raja Chutter Sein v. The younger widow of Raja Chutter Sein* (a), *Radha Bullubh Chund v. Juggut Chunder Chowdree* (b), *Bhowanee Purshad Chowdree v. Rance Jugudrumbha* (c), *Ram Sunder Ray v. Heirs of Raja Udwant Singh* (d),

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(a) 1 Ben. Sud. Dew. Rep. 180.

(b) 4 Ben. Sud. Dew. Rep. 151.

(c) 4 Ben. Sud. Dew. Rep. 343.

(d) 5 Ben. Sud. Dew. Rep. 210.

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Mullick v. Mullick (a), Sibchunder Mullick v. Sreemutty Treeporah Soondry Dossee (b), Mohunt Gopal Dass v. Mohunt Kerssaram Dass (c). If the question is to be decided by English law, it would be hardly possible, reading the fifth clause in connection with the other clauses in the Will, to doubt, that the Testator gave estates for life *inter se* to his sons with cross remainders to the survivors, if any one died without male issue; therefore, on the death of the Respondent's husband his share would go to his surviving brothers to the exclusion of the Respondent as his heir. The Respondent, as widow of *Hurrymohun*, one of the Testator's grandchildren, is not entitled under the Will to any share of the estate of the Testator, either in the corpus as it stood at the time of her husband's decease, or to any part of the accumulations or surplus income thereof; and the declaration of the Court to that effect was erroneous, as she was only entitled to maintenance. *Sreemutty Sorjeemoney Dosse v. Denobundoo Mullick (d)* is distinguishable from the present case. There the widow was held entitled to the profits of an estate which had accumulated during the life of her husband; but in that case there was no direction in the Will that the family was to remain joint in estate, and, therefore, nothing to imply that the accumulations should become increment to the corpus. Here, on the contrary, the surplus profits are to be added to the corpus, and the Testator provides that in case of disagreement the surplus profits should be divided,

(a) 1 Knapp's P. C. Cases, 245.

(b) 1 Fulton, 98.

(c) 10 Ben. Sud. Dew. Rep. 250.

(d) 6 Moore's Ind. App. Cases, 526.

which state of things did not exist in that case. Lastly, we contend that directions as to taking the accounts were improper.

Their Lordships' judgment was delivered, as follows, by

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The Lord Justice TURNER.

The question in this case ultimately resolves itself, as their Lordships think, into a question of the construction to be put upon a Hindoo Will; and it may not be improper to observe that, with reference to the testamentary power of disposition by Hindoos, that the extent of this power must be regulated by the Hindoo law.

The first point which arises on the construction of this Will, is, whether, according to the true intent of the Will, the idol for whom the property is granted was intended to take absolutely.

Now, a reference to the second, third, and fifth clauses of the Will lead us to the conclusion, that although the Will purports to begin with an absolute gift in favour of the idol, it is plain that the Testator contemplated that there was to be some distribution of the property according as events might turn out; and that he did not intend to give this property absolutely to the idol seems to their Lordships to be clear from the directions which are contained in the third clause, that after the expenses of the idol are paid, the surplus shall be accumulated; and still more so from the fifth clause, by which the Testator has provided for whatever surplus should remain out of the interest of the property, the expenses of the idol being first deducted. It is plain, that the Testator, looking at the expenses of the idol, was not con-

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templating an absolute and entire gift in favour of the idol.

The rights, therefore, of the idol being thus disposed of, the question then arises, what was to become of the property, subject to the payments which were to be made for the expenses of the idol. And here we have two divisions of the Will. The Testator evidently contemplated two events; one, in which the family was to continue joint and undivided, and the other, in the event of the family becoming divided. Now, with reference to the second branch of this Will, the event of the family becoming divided, that state of circumstances does not appear to have arisen. There has been no division at all of this family, unless the division of the income during the few years which followed upon the death of the Testator up to a short period after the death of *Hurymohun Bysack* constituted a division of the family, and their Lordships are very clearly of opinion, that the mere division of income, for the convenience probably of the different members of the family, did not amount to the division of the family.

In considering the case, therefore, we may for the present (whatever questions may hereafter arise upon it) consider this family as an undivided family; and the point for determination is, what are the rights of these parties in the property? Considering the family as a joint and undivided family. Now, in that case, it is plain, that the Testator contemplated that the property was to go in the male line. He says, that he has four sons, that his property shall never be divided and partitioned amongst them, and that the sons and their offspring, that is to say, their "sons and grandsons, heirs in succession," shall not have the power of

alienating any of the property by deed or gift, nor shall the property be liable to sequestration for their debts. The Testator, then, having intended that the property should pass from the four sons to their sons and to their grandsons, the event which has happened is this, one of the sons died leaving three sons, who accordingly came into his share, and one of those three sons afterwards died leaving no male issue.

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Now, what is the consequence of that? There are directions in the Will that the property is to go in the male line to the sons and their descendants, but one of them dies leaving no issue in the male line, and the Will is silent as to what the disposition of the property is to be in that event. It is a share of the property of the joint family, descendable, therefore, to the heir to whom that property would go in the absence of any provision made by the Will. The consequence, therefore, as it appears to their Lordships, must be, that upon the death of *Hurymohun*, this property must have descended, and that the one-third of one-fourth passed to *Hurymohun's* heir, his widow, so far as she is entitled to her widow's estate.

What their Lordships propose to do is, to declare that, according to the true construction of the Will, the property granted to the idol is effectually granted for the benefit of the Testator's four sons and their offspring in the male line as a joint family, subject to the performance of acts, business, ceremonies, and festivals, and to the provisions for maintenance in the Will contained, and that the surplus income, after answering the performance of such provisions, is in like manner well and effectually given for the benefit of the four sons and their offspring in the

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male line, as a joint family. It appearing that *Krishnomungle*, one of the sons, died, leaving three sons, and that *Hurrymohun* died leaving no male offspring, the family continuing joint up to the death of *Hurrymohun*; their Lordships also propose to declare, that upon the death of *Hurrymohun*, his share of the joint estate, subject as aforesaid, passed to the Respondent, his widow and heir, and she is entitled to one-third of one-fourth as widow and heir. Their Lordships think that, under the circumstances of this case, it would be better not to direct the accounts to be taken in the mode in which the Court has done, but simply to give liberty to apply, in order that the parties may, as they probably will do if they are well advised, come to some arrangement upon the subject of the amount. There will be liberty to apply as to the amount, or otherwise as the parties may be advised. And, it appearing, that there has already been an Order made for the maintenance of this lady of Rs. 100, a month, that Order must be continued, and she will account for what she has received under that Order as against what may be coming to her upon the account to be taken. The better course would be, to discharge the Order which has been made by the Court below, and simply to make the declarations which I have suggested with a limit and a direction to continue the maintenance, and that she shall account for what she may have received under it.

Their Lordships think that the costs of the appeal may very properly be given out of the estate.

The following report was made by the Judicial Committee, and confirmed by Her Majesty's Order

in Council. “Their Lordships are of opinion that it ought to be declared that, according to the true construction of the Will of the Testator, the whole of the Testator’s moveable and immoveable property was, and is, well and effectually given for the benefit of the Testator’s four sons in his Will named, and their offspring in the male line, as a joint family, so long as the family continues joint, subject, however, to the performance of the acts, business, ceremonies and festivals, and to the provisions for maintenance in the Will contained, and that the surplus income of the property after answering such performance and provision was and is, in like manner, well and effectually given for the benefit of the four sons and their offspring in the male line, as a joint family, so long as the family continues joint. And, it appearing, that *Krishnomungle Bysack*, one of the four sons, died leaving three sons, their Lordships report as their opinion, that it ought to be declared by Your Majesty, that each of the three sons became entitled to a third part of one-fourth part of the property, and of the accumulation thereof. And, it appearing, that *Hurrymohun Bysack*, one of the three sons of *Krishnomungle Bysack*, died leaving no male offspring, and that the family continued joint up to the time of his death and still continues joint; their Lordships do further report as their opinion, that it ought to be declared by Your Majesty, that upon the death of *Hurrymohun Bysack*, the third part of the fourth part of the property and accumulations to which he became entitled as aforesaid passed to the Respondent, *Sreemutty Juggutsoondree Dossee*, as his widow and heir, and *Sreemutty Juggutsoondree Dossee* accordingly became and is entitled as such widow and

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heir, to the third part of the fourth part of the property and accumulations. And their Lordships are further of opinion, that *Sreemutty Juggutsoondree Dossee* ought to be at liberty to apply to the Supreme Court at *Calcutta* as to the accounts and otherwise as she may be advised; and their Lordships are of opinion, that the Order made in this cause by the Supreme Court of *Calcutta*, bearing date the 28th of *July*, 1857, ought to be continued until further order. And their Lordships do further report, that in case Your Majesty should be pleased to approve of this report and to Order accordingly, such Order ought to be without prejudice to any question as to the rights of *Sreemutty Juggutsoondree Dossee* of and when the joint family shall be separated.”

RAJMOHUN GOSSAIN AND JUGMOHUN } Appellants,
GOSSAIN - - - - - }

AND

GOURMOHUN GOSSAIN - - - - - Respondent.*

*On appeal from the Sudder Dewanny Adawlut,
Calcutta.*

*Compromise—Construction—Compromise between Hindu brothers—
“Ancestral property”—Meaning—Compromise decree—Appeal against—
Prosecution of, if fraudulent.*

In a *Ruffanamah*, or deed of compromise, of a suit between three sons, members of a Hindoo family, respecting the distribution of their father's estate, it was stipulated, that all “ancestral” property should be equally divided into four shares. Held, that the sense in which the word “ancestral” was employed was not confined to such property as the father had derived from his ancestors, but included “paternal” property, or such as had been acquired by the father by whatever title, and was possessed by him at the time of his decease.

A decree of an appellate Court in India, obtained after a compromise, held, in the circumstances, fraudulent, and set aside with costs.

The facts of this case, and the arguments, sufficiently appear in the judgment.

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Dec. 1859.

The appeal was argued by

Sir *Hugh Cairns*, Q.C., and Mr. *Maude*, for the Appellants; and

Mr. *R. Palmer*, Q.C., and Mr. *Leith*, for the Respondent.

Their Lordships' judgment was delivered by

The Lord Justice KNIGHT BRUCE.

The parties to this litigation are three brothers,

* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. The Lord Justice Turner.

Assessor,—The Right Hon. Sir James W. Colvile.

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the surviving sons of a Hindoo named *Raghub Ram Gossain*, of *Serampore*, who appears to have been a person of considerable wealth. The Appellants here are the two younger of those three sons, the Respondent being the eldest. The object of the suit in which the appeal arises was to obtain possession of two-fourths of a landed property, called *Lot Harit*, which, at the time when *Serampore* was a Danish settlement, was out of that jurisdiction, and was, as it still is, within the jurisdiction of the *Calcutta* Courts, the deceased having had considerable property, and probably the bulk of his property, within the jurisdiction of the then Danish Court of *Serampore*.

The Respondent, the eldest son, admits the title of the Appellants to two-fourths of this estate which they claim, subject only to the important qualification that he claims to have a pecuniary charge on the property to a considerable amount, in respect of having, as he says, paid the price of it, the fact being that the estate was purchased by the father in the name of the eldest son ; and the question raised is, whether the money, which was in fact paid to the seller, was or was not advanced by the eldest son (in whose name the purchase was made) for the father.

He alleges that the money was paid by him, and that he is still a creditor of the father for it; and the alleged charge in respect of it, is, as has been said, the only objection which he makes to the claim of the Appellants. The Appellants deny that the money was paid by the Respondent, and further insist that, whether it was or was not paid by him, all questions relating to that alleged payment were formerly the subject of dispute, and settled by adjudication; and,

therefore, that if anything was ever due to him on the security of that property, nothing has remained due. 1859.
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This, the only substantial point in dispute, was decided, in the first instance, in favour of the Appellants, by the proper Court of original jurisdiction, the *Zillah* Court of *Hooghly*; but on appeal to the *Sudder Dewanny Adawlut*, that decision was reversed, and judgment given in favour of the Respondent, which has brought the Appellants here. 7.
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The circumstances in which the claim arose were these. The eldest son, the Respondent here, appears on the death of his father, which took place some time before the year 1840, to have taken possession of all his property; at least, he was believed to have done so, and treated as having done so. In consequence, litigation of various kinds arose in the family, on the part of the present Appellants, on their own behalf, and also on behalf of the widow of a brother, and probably of their sisters also, on one side, and the present Respondent, the eldest son, on the other. Two of these suits were brought in the Danish jurisdiction at *Serampore*; the third, relating to the immoveable property out of that jurisdiction, namely, the property now in dispute, *Lot Harit*, was within the *Calcutta* jurisdiction. The result of these three litigations were three decrees, one in the Danish Court at *Serampore*, of the 6th of *November*, 1840, another in the same jurisdiction of the 14th of *May*, 1841, and the other in the *Zillah* Court of *Calcutta*, of the 31st of *August*, 1841. They were all in favour of the present Appellants, including not only the adjudication that a large sum of money was due from the eldest son, but also deciding for their title to

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shares of *Lot Harit*, the estate within the *Calcutta* jurisdiction.

One of these decrees, that of the 14th of *May*, 1841, relating, it seems, to family jewels and other such specific goods, was not capable of appeal, or was not appealed from, and is out of the question; but the eldest son, the Respondent here, did appeal from the decree of the 6th of *November*, 1840, to the proper Court in *Denmark*, and did appeal from the decree of the *Zillah* Court of the 31st of *August*, 1841, to the proper *Sudder* Court at *Calcutta*.

A family quarrel on so extensive a scale excited general attention, and an endeavour was made in a friendly and kind manner by the Governor of *Serampore* then under the Danish rule, or a gentleman of considerable station there, to effect a settlement of the disputes, and at last it was done. The settlement was effected by an agreement, or *Ruffanamah*, made on the 4th of *August*, 1842, in these words:—“*Serampore, August 4th, 1842.*—The long-pending dispute between *Baboo Gourmohun Gossain* and his brothers having occasioned great scandal and inconvenience, the Honourable Mr. *Hansen*, the Governor of *Serampore*, being exceedingly anxious to terminate these differences, called both parties before him on the above-mentioned date, and having required them mutually to explain their wishes, prevailed upon them to agree to a settlement in the following terms:—

“1. That all ancestral property should be equally divided into four shares.

“2. That the sum of Rs. 15,000, be paid to the elder brother, *Rajmohun*.

“3. That the sum of Rs. 15,000, be paid to the

third brother, *Jugmohun*, from which is to be deducted the sum of Rs. 5,640, already paid him for the purchase of a house.

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“4. That in reference to the share of the fourth brother, deceased, which amounts to Rs. 15,000, *Gourmohun* agrees to pay his widow monthly interest at the rate of five per cent. per annum, and also to give a bond in the *Serampore* Court for the payment of the principal of Rs. 15,000, if she should adopt a son, when that son comes of age. Should she die without adopting a son, the sum of Rs. 15,000, will be divided according to law into three parts among the three brothers, or their surviving families; and as security for this bond, will pledge property in *Serampore* to the satisfaction of the Court.

“5. That the sum of C. Rs. 10,000, be paid to the widow of the late *Raghob Ram Gossain*, to be disposed of according to her own wishes, in full of all claim; and in case of her dying without making any disposition of it, *Gourmohun* relinquishes all claim to it.

“6. That the sum of C. Rs. 12,500, be paid by *Gourmohun Gossain*, on account of the house built by him after the death of his father; and that the house, together with the piece of ground in front of the house, do, after the payment of this sum, remain his sole and entire property; his brothers and their family agreeing to quit it, including *Hurree Chootar's* ground, consisting of fourteen cottahs.

“The sum which *Gourmohun Gossain* thus engages to pay, to settle all differences with his family, stands thus:—

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	Rs.
"To <i>Rajmohun Gossain</i>	15,000
"To <i>Jugmohun Gossain</i>	15,000
"Less for the house ac- cording to the deed of sale	5,640
	<hr/> 9,360
"To the widow of the late <i>Raghob Ram Gossain</i>	10,000
"To the sisters	10,000
"For the house in full	12,500
	<hr/> Rs. 56,860

"Of this sum *Gourmohun Gossain* engages to pay in cash the sum of Rs. 35, 000, within thirty days from the signing of this document, and the remainder of this sum, namely, Rs. 21,860, at the end of eighteen months from this date, with interest at the rate of 5 per cent. per annum, giving security for the same.

"In witness thereof the parties have hereunto set their hands this 4th of *August*, 1842, *Gourmohun Gossain, Rajmohun Gossain, Jugmohun Gossain*. Signed in our presence, *P. Hansen, John Marshman, Hurchunder Laheree, Krishno Comar Laheree*."

Before proceeding to mention the next document, it should be observed as to the remarks which have been made upon the word "ancestral," contained in the first clause after the introductory part of the *Ruffanamah*, that their Lordships are of opinion that "ancestral," as here used, is not confined to such property, if any, as the father had derived from his father, or from any ancestor; but that "ancestral" is here employed (and so the Respondent himself, upon more than one occasion, has shown that he

understood it), in the sense of “paternal,” that is, as meaning property of the father, in whatsoever manner, or by whatsoever title, the father had acquired it; and, therefore, that “ancestral property” means property derived from the father; at least, immoveable property.

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Some months after this agreement, namely, in *February* of the year 1843, mortgage bonds, as we may call them, were executed by the Respondent, to his brothers respectively: one (in the same form, *mutatis mutandis*, as the other) was thus:—“Know all men by these presents, that according to agreement concluded on the 4th *August*, 1842, between me and my brother, *Jugmohun Gossain* and others, I have been bound to pay to *Jugmohun Gossain*, as his share of ready money belonging to our late father’s estate, the sum of Rs. 15,000, besides one-third of a sum of Rs. 12,500, that according to the agreement was to be paid by me on account of the dwelling-house in this town; and *Jugmohun Gossain* having on the 15th *January*, this year, from the Court of *Serampore*, received this one-third of the above sum of Rs. 12,500 on account of the dwelling-house, and in part of the above Rs. 15,000, the sum of Rs. 8,442, partly by value of a house, and partly out of the sum of Rs. 35,000, deposited by me in Court on the 2nd of *September*, 1842. I herewith, in conformity with the agreement, execute to him the present deed of mortgage, whereby I promise to pay to him the remaining part of the last-mentioned sum, being Rs. 6,558, on or before the 4th of *February*, 1844, together with interest at five per cent. from the date of the agreement, 4th *August*, 1842, and until the day of payment; and to secure him the payment

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thereof, I pledge and mortgage to him, as second mortgage, the whole of my landed property, with building and appurtenances, situated within this settlement, next after the sum of Rs. 6,558, for which I have this day executed a deed, a mortgage to *Rajmohun Gossain*. Further, I do herewith, in conformity with the agreement, bind myself to allot to him, *Jugmohun Gossain*, before the 4th of *August*, 1843, his one-fourth share of our ancestral landed property, with appurtenances and buildings, that is to say:—

“1st. All property situated within the settlement of *Serampore*, which at present stands registered in the joint name of mine and either of my brothers, *Rajmohun Gossain* and *Jugmohun Gossain*, or the late *Nundomohun Gossain*, including the services of the family deity, *Sree Sree Radhamadhubjee Thakoor*, with the exception of the dwelling-house mentioned in the agreement, together with the ground belonging thereto, as per *pottah* No. 1,379, and also the ground formerly belonging to *Hurry Chootar*, obtained by the decree of the *Serampore* Court of the 28th *August*, 1841.

“2nd. The ancestral *Talook*, called *Hooda Gopaulsingpore*, in *Umursee*, in the *Zillah* of *Midnapore*.

“3rd. The patrimonial *Talook*, called *Lot Harit*, in the *Zillah* of *Hooghly*, together with the profits from the 4th of *August*, 1842.

“4th. Our patrimonial share of the house called *Bassabautee*, in *Burabazar*, *Calcutta*. (Signed) *Gourmohun Gossain*. *Serampore*, *February* 6, 1843.”

It need not be said that the property named in clause 3, *Lot Harit*, is that of which two-fourths are now in dispute; and by the effect of the agreement,

and these two mortgage bonds, two-fourths of that property, among others, were allotted to the two younger sons.

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It seems that some time after this, the Respondent was desirous of obtaining, and, almost of course, perhaps, for that reason, the Appellants were desirous of not giving, a release, and accordingly, the Respondent instituted a suit for the purpose of compelling them to give it; and he obtained a decree against them in the Court of First instance. The adjudicating part of the decree being in these words:—"It is, therefore, directed, that when the Plaintiff, *Gourmohun Gossain*, complies with the conditions of the *Ruffanamah*, of the 4th of *August*, of the year 1842, filed in the present suit, and besides pays to *Puddomonee Dabee*, Rs. 438. 14a., the costs of suit, No. 109, of the year 1838, and pays to *Oornopoorno Dabee*, *Rajmohun Gossain*, *Jugmohun Gossain*, *Ruddumbence Dabee*, *Dimla Dabee*, *Madhobee Dabee*, *Proshunno Dabee*, C. Rs. 2,003. 2a., the costs of civil suit, No. 969, of the year 1838, then he will be exonerated from the claims of the said individuals on account of the paternal property which they have inherited as the heirs of their father, *Raghub Ram Gossain*, deceased. Both the parties will pay their respective costs of the present suit."

The present Appellants appealed from that decision, and the decision was affirmed in the year 1849. The judgment of the Court is in these words:—"No attempt has been made to show that the settlement was partial or unfair. The mere fact of compromise for a less amount than was legally due, cannot of itself impugn the settlement; for it is in evidence that great difficulty was experienced in

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executing the decree, and an appeal from it to *Denmark*, attended with ruinous expense, had been preferred; and it was ordered, that the decision of the Court of *Serampore* should be affirmed, and the appeal dismissed; and in consideration of the special circumstances of this case, each party pays his own costs of the suit.”

Now, it is with documents such as these, altogether unimpeached, before us, that the Respondent contends that the true meaning of what took place in the years 1842 and 1843 was this: that though he was to divide *Lot Harit*, yet he was to divide it without prejudice to his claim as an alleged mortgagee, or holder of a lien, as we should call it, and that all that he was to give up was what we should call the equity of redemption, subject to that. Their Lordships, however, are of opinion, that the documents themselves, whether the rest of the evidence be or be not considered, afford a plain and complete contradiction to that allegation.

Their Lordships are of opinion, that such a construction of the documents as would leave the Respondent in possession of a pecuniary charge upon *Lot Harit* is unreasonable and inadmissible.

If, therefore, there were no other difficulty in the case, the title of the Appellants would be plain and clear, viz., to have two fourths of *Lot Harit*, and an account of the *wassilat* in consequence, as originally decreed. But this difficulty has arisen. Notwithstanding the arrangements of *August*, 1842, and *February*, 1843, the Respondent thought fit, but as their Lordships think against all propriety, to prosecute an appeal against the *Zillah* decree of the 31st of *August*, 1841, which had given to the Appellant's shares of

Lot Harit. Accordingly, that appeal having been brought up, and substantially unopposed, the Respondent obtained from the *Sudder Court*, on the 30th of *March*, 1843, a decree, the ordering part of which is these words:—

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“Therefore it is finally ordered, that the Appellant’s appeal be decreed, and the decision of the Judge amended; and the Plaintiffs, Respondents, on the condition that if they deposit in the treasury of the Court from this date, within the period of six months, the purchase-money of a 12 *annas* share of *Talook Harit*, then they are to be put in possession of a 12 *annas* share, without *wassilat*, and the whole of the costs of this Court, according to the account of *Khurcha Nuvees* (Accountant of costs), with interest thereon, from this date up to the date of realization, be entered against Respondents. And if the Appellant has deposited the costs of the *Zillah Court*, then he is to present a petition for its return, and the order for its payment, with interest, up to the date of realization, according to the general Order of this Court dated the 3rd of *June*, 1837, will be passed.”

Of course the money was not paid, and the contention of the present Respondent is, that the decree of 1843, established the title which he alleges, and that as the money was not paid within the period prescribed by the decree, he is entitled to claim the property as his own in a manner analogous to a title by foreclosure ; but, he says, that he is willing to submit to what we should call redemption.

Their Lordships, however, are of opinion, that the claim is entirely untenable.

Assuming (though their Lordships do not decide) that the decree of 1843, amounted to an adjudication

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against the present Appellant's title, we think, that it was an adjudication obtained not only with great impropriety, but, in effect, by fraud; for it was plainly the duty, in every sense the duty of the present Respondent after the compromise (a compromise insisted upon by him) not to prosecute that appeal. Doing so, he did it at his own peril, for success could by no possibility benefit him, if his title, by reason of that success, should be properly impeached.

It is said that, on the assumption that the decree of 1843, is an adjudication against the present Appellant's title, the fraudulent nature of the decree has not been put in issue, and it has not been in a proper manner sought to be set aside.

Their Lordships are not of that opinion. They are of opinion, that the fraudulent nature of the Respondent's conduct in obtaining the adjudication is sufficiently put in issue by the original plaint in the case, and by the replication, in both of which it is impeached, and, as their Lordships view the matter, in a proper manner impeached, for fraud; and the decree of the *Zillah* Court treating it as a nullity against the title of the present Appellants was, as their Lordships consider, properly made, with costs, and ought to be restored.

If the Appellants have paid any costs under the decision of the *Sudder* Court, those costs should be repaid; and the present Appellants should have their costs of the proceedings in the *Sudder* Court, and of the appeal here, from the Respondent.

The humble recommendation of their Lordships to Her Majesty will be made accordingly.

THOMAS EALES ROGERS - - - - - Appellant,

AND

RAJENDRO DUTT, and others - - - - Respondents.*

On appeal from the Supreme Court at Calcutta.

Tort—Action for damages—Essentials of—Malice, if to be proved.

In the case of damage occasioned by a wrongful act, though such as the law esteems an injury, malice is not a necessary ingredient to the maintenance of an action.

It is essential to an action in tort that the act complained of should be legally wrongful as regards the party complaining, i.e. it must prejudicially affect him in some legal right. The fact that it will, however directly, do him harm in his interests is not enough.

An order issued by the Superintendent of marine, in his official capacity, to the *Bengal Pilot* service, employed by the East India Company on the *Hooghly* river, prohibiting them from allowing a particular steam tug to take any ship in tow of which such pilots should have pilotage charge, made in consequence of what the Superintendent deemed an exorbitant demand on the part of the owner of the steam tug, whereby such owner was deprived for a time of the profits of being employed by the pilots in charge of ships going up or down the river *Hooghly*; in the absence of malice, alleged or to be inferred, is not such a wrong as would sustain an action by the owner of the tug against the Superintendent of marine, the officer of the Government, issuing such order.

Upon appeal the judgment of the Supreme Court at *Calcutta* maintaining the action, reversed, on the ground that the Government had the same rights as a private individual in declining to employ the tug if the charges were too high.

In the action, the Court at *Calcutta* gave damages, the amount of which was under the appealable value prescribed by the *Calcutta* charter. As an important point of law was involved, special leave to appeal was upon petition, granted.

THIS was an action brought in the Supreme Court at *Calcutta*, by the Respondents against the Appellant, under the following circumstances:—

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The Appellant was the Superintendent of marine at *Calcutta*, an official Government situation under

* Present: Members of the *Judicial Committee*,—The Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge.

Assessor,—The Right Hon. Sir Lawrence Peel.

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the East India Company, and in that capacity had the control of the whole of the Marine department under Government, including the superintendence and control of the *Bengal* pilots employed by the Government, who were the only pilots who are engaged in piloting vessels on the river *Hooghly*. There was no legal obligation to employ a pilot, but from the dangerous nature of the river no ship could be safely navigated up or down unless in charge of a pilot. Tugs were required for bringing vessels up the river. The Respondents were the owners, or part owners, of a steam tug called The "*Underwriter*," which was employed in towing vessels on that river. It appeared that there were two rates of payment for the steam-tugs employed, the first called the Government certificate, according to a tariff, for the time employed, and the second by special contract.

On the 20th of *September*, 1857, whilst the Indian mutiny was raging in full force, and every exertion of the Indian Government and its officers was being made to face the difficulties in which they were placed, Her Majesty's ship "*Belleisle*," with troops on board, destined for *Calcutta*, arrived at the mouth of the river *Hooghly*; and on the 19th of that month, the Captain of the "*Underwriter*," having understood that she wanted steam, went on board The "*Belleisle*," and entered into a negotiation with the Captain of that ship as to the terms upon which she should be taken in tow. The Captain of The "*Underwriter*" required at first Rs. 3,000, and then Rs. 2,500, and produced a contract ready prepared, for the Captain of The "*Belleisle*" to sign. This, however, he refused to agree to; when The "*Underwriter*" left The "*Belleisle*," and carried on shore a

telegram from the Captain of The "*Belleisle*" to Mr. *Beadon*, the Secretary to the Government of India, asking to be allowed to employ The "*Underwriter*," but without stating the terms demanded by her Captain. *Beadon* replied to this communication, authorising Captain *Rodd* of The "*Belleisle*," to employ The "*Underwriter*" under Government certificate, which would have entitled her to a certain fixed rate *per diem*, according to the work done; and, on the morning of the 20th, the Captain of The "*Underwriter*" having proceeded on board The "*Belleisle*," was informed of this by Captain *Rodd*. He, however, refused to tow upon certificate, and still required a contract for Rs. 2,500: and thereupon Captain *Rodd* again telegraphed to *Beadon*, and requested instructions. This message *Beadon* sent at once to the Appellant, with a note, telling him shortly what had happened, and asking what, in the circumstances, had better be done, when the Appellant, considering the charge exorbitant, and that it was an attempt to make a market of the necessities of the Government, at so critical a period, and that it was of great importance that some step should be taken to prevent the recurrence of similar attempts, went to *Beadon* and expressed this to him, as his opinion, and that he thought the better course was to inform the agents of The "*Underwriter*," that if they declined to take The "*Belleisle*" in tow, an order would be issued, prohibiting the pilots of the port, who should be in charge of any vessel, from taking steam of The "*Underwriter*." *Beadon*, having approved of this course, *Hill*, the officiating first assistant, made a communication to that effect to the agent of The "*Underwriter*" at Calcutta, and the Captain of The "*Belleisle*,"

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in the circumstances, refused to take steam of The “*Underwriter*,” except under Government certificate.

On the 22nd of *September*, 1857, the Appellant, in his official capacity, directed an order to be issued in the terms stated by him to *Beadon*. This order was as follows:—“Steamer ‘*Underwriter*.’ No. 2,629. —For general information. Memo.—Officers of the Pilot service are, under orders of the Superintendent of marine, prohibited from allowing the steamer ‘*Underwriter*’ to take any ship in tow of which they have pilotage charge. (Signed) *J. S.*”

Upon the issuing of the order, the Respondents applied to the Government upon the subject, complaining of the order, and after some correspondence, the Government, on the 19th of *October*, 1857, directed the order to be withdrawn. On the 13th of *November*, 1857, an action was brought by the Respondents in the Supreme Court at *Calcutta* against the Appellant.

The plaint was in form, an action on the case, and pleaded, in substance, the facts above stated, charging the Appellant with wrongfully and injuriously issuing the order in question. It did not contain any averment of malice ; but damages were claimed for the alleged non-employment of The “*Underwriter*” during the period the order was in force. The Appellant pleaded not guilty, and other pleas not material to mention. The cause came on for trial in the Supreme Court at *Calcutta* on the 3rd of *March*, 1858, before Sir *James W. Colvile*, Chief Justice, and Sir *Charles M. Jackson*, Puisne Judge ; when the above facts were in substance proved, all malice on the part of the Appellant being negatived. Evidence was given that, during the period the order was in force, The “*Un-*

derwriter'' had not been engaged in towing vessels in the course of her ordinary business, but on the occasion of the refusal to tow The "*Belleisle*," she afterwards took in tow a private ship drawing nine inches less water than that ship for Rs. 1,600. At the close of the Respondents' case, the Appellant's Counsel applied for a nonsuit on the ground that no cause of action was disclosed; the Court found a verdict for the Respondents on all the issues, with Rs. 6,624 damages, leave being reserved to the Appellant to move to enter a nonsuit, on the ground that no action was maintainable, or to reduce the damages to a nominal sum. A rule *nisi* was afterwards granted, when the questions reserved came on for argument, and the rule was discharged on the 19th of *March*, 1858, with costs; the Court holding that the plaint was established by the evidence, and that it disclosed a good cause of action.

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The judgment of the Court was delivered by the Chief Justice, Sir *James W. Colvile*, as follows:—"In this action on the case, the Plaintiffs have recovered a verdict for Rs. 6,624, subject to the questions raised by the rule of which we have now to dispose. These questions are, first, whether judgment ought not to be arrested, on the ground that the plaint does not disclose a legal cause of action? Secondly, whether the verdict entered for the Plaintiffs ought not to be set aside, and a nonsuit entered, on the ground that the Plaintiffs have not proved any legal cause of action? Thirdly, whether, assuming a legal cause of action to be alleged and proved, the Court was justified in giving more than nominal damages? The first question, of course, arises on the record; the others, on

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the evidence given to meet the plea of not guilty. Besides that plea, there are only two traverses on the record raising issues on which the finding for the Plaintiffs is not impeached by the rule ; if, therefore, a legal cause of action has been alleged and proved, the Plaintiffs are necessarily entitled to recover something, since nothing is pleaded by way of confession and avoidance. I have somewhat changed the order of the questions raised by the rule, because it is more convenient to consider, first, that which arises on the record, since, if that is determined in the Defendant's favour, it will be unnecessary to consider the effect of the evidence. The plaint is in case. It states, by way of inducement, first, that, at the time of committing the grievance, the Plaintiffs were the owners of the steam-vessel The '*Underwriter*,' which had theretofore been, and then was, profitably employed by them as a steam-tug between the mouth of the river *Hooghly* and the port of *Calcutta*. Secondly, that the Defendant, as Superintendent of marine, was invested with and possessed of the chief authority and control over all the officers of the *Bengal* pilot service employed by the East India Company on the said river, for the purpose of piloting vessels thereon to and from the port of *Calcutta*. Thirdly, that the officers of the *Bengal* pilot service are the only pilots who upon the river exercise the trade and calling of pilots, and take pilotage charge of inward and outward bound ships ; and that, in consequence of the perils of the navigation of the said river, no ship can with safety proceed inwards or outwards thereon, or be duly navigated, except the same be in charge of a competent pilot. It then alleges that the Defendant, contriving and intending to injure the Plaintiffs, and

to prevent them from continuing to employ their vessel in the manner before mentioned, and to deprive them of the profits resulting therefrom, wrongfully and injuriously issued and published a certain order, addressed to the officers of the *Bengal* pilot service, whereby the Defendant, as such Superintendent of marine, strictly prohibited them from allowing the said steam-vessel The '*Underwriter*' to take any ship in tow of which they, the officers of the *Bengal* pilot service, should have charge. It further alleges, that this order continued in force and unrevoked, and was obeyed by the officers of the *Bengal* pilot service, for a long space of time, to wit, from the 22nd of *September* to the 19th of *October*—and that, during all that space of time, the masters and owners of divers ships were desirous of employing the Plaintiffs' steam-vessel to tow their ships inwards and outwards on the river *Hooghly*, and would so have employed the same, but that they were prevented from so doing by the continuance of the said order, and the obedience thereto of the officers of the pilot service, so long as the same remained in force. *Per quod*, the Plaintiffs were for a long time, to wit, twenty-five days, and until the recall of the order, prevented from continuing to employ their said vessel in towing ships, and had been thereby deprived of the large profits which they would otherwise have made from such employment. It may be well to admit at once, because it will clear the ground of some of the arguments used, that this plaint does not allege either that the Defendant was under a legal obligation to furnish a pilot to every ship that required one, or that there was any contract between the Plaintiffs and the Defendant, or that any contract

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subsisting between the Plaintiffs and any other persons had been broken by the procurement of the Defendant. Therefore, the right of action, if it exist, cannot be rested on the breach of any public duty imposed by Statute or otherwise, or on the breach of any duty flowing from a contract between the parties, or upon the grounds recognized in *Lumley v. Gye* (2 Ell. & Bla., 216). But wrongs falling within one or other of these classes are not the only wrongs for which an action on the case will lie. *Gerhard v. Bates* (2 Ell. & Bla., 476), is a clear authority for the position, that if the wrong and the consequential loss are, to use Lord Campbell's phrase (*ib.* 490), 'clearly concatenated as cause and effect,' the action is maintainable, although it does not arise from any public wrong, or the neglect of any public duty, and the parties are entire strangers to each other, no privity subsisting between them. Have we, then, here alleged a tort, occasioning a loss to the Plaintiffs? The loss is clearly stated, but it may be *damnum sine injuria* ; or, if the tort be established, the loss may not be sufficiently 'concatenated with it as cause and effect ;' or, in other words, may be too remote to be the subject of an action. Now, if we turn to the definition of a tort in *Broom's Comms.*, so often cited at the bar, we find that, if not founded on the violation of some special duty, public or private, it may be founded simply on the invasion of a legal right ; and the fallacy in some of the arguments used for the Defendant, consisted in the erroneous statement, or in the absence of a clear perception, of the right which the Plaintiffs say the Defendant has invaded. That right is not the right to have a pilot, but the right to employ their vessels in towage ; in other words, the right of exercising their

lawful trade or calling without undue hindrance or obstruction from others ; and surely it cannot be contended that this is not one of the rights which the common law recognizes and protects! The contest between the House of Commons and the Crown, in the times of the *Tudors* and the *Stuarts*, which resulted in the Statute of Monopolies, and all the learned arguments in the great case of *The Monopolies*, in the reign of *Charles the Second* (10 State Trials, 312), assume the existence of the right. The only question was, the degree in which the asserted prerogative of the Crown could override it. Lord *Coke's* definition of a monopoly is, 'An allowance by the King, by his grant or otherwise, to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using, anything whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade.' The resolutions in *The case of the Taylors, &c. of Ipswich* (11 Co. Rep. 53), and in *The case of the Monopolies* (11 Co. Rep. 84), also assume the right of the subject to be protected in the exercise of his lawful trade. Again: if this right is not recognized and protected by law, on what principle do words spoken, though not actionable in themselves, become actionable if spoken of a man in his trade or calling? Therefore, that the Plaintiffs had a common law right to contract with the master of any vessel on the river who might be willing to engage The '*Underwriter*,' and to perform that contract by towing his vessel, cannot, we think, be denied. The difficulty in the case lies in the nature of the alleged invasion. The invasion, to be actionable, must, of course, be wrongful. Interference

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with a man's trade by fair competition ; as in the instance found in the authorities, of a new school established so as to draw away the scholars from an old school ; is not actionable. The loss in such a case is, in fact, not caused by wrong, but by another's exercise of his undoubted right ; and, in every complicated society, the exercise, however legitimate, by each member of his particular rights ; or the discharge, however legitimate, by each member, of his particular duties ; can hardly fail occasionally to cause conflicts of interest which will be detrimental to some. The question here is, whether enough is stated on the face of this plaint to show that the Defendant's interference with the Plaintiffs' trade was wrongful? Now, what appears on the face of the plaint? That the Defendant, by virtue of his office, had the power to control the pilots of the *Bengal* pilot service ; but there were no other pilots on the river ; that no ships can be safely navigated up or down the river unless it be in charge of a pilot ; that the Defendant, with the intention of preventing The '*Underwriter's*' employment, issued an order forbidding the pilots from allowing that steamer to take any vessel in tow of which they should have charge ; that the order was obeyed and remained in force a certain time, during which the Plaintiffs were, by reason of the order, prevented from employing their steamer as a tug, and so hindered in their trade. It may be said that it is not the pilot but the Master whose business it is to engage towage, and, therefore, that the employment of the Plaintiffs' vessel was not prevented by an order addressed to the pilot. But if this objection arise in arrest of judgment, the fair intendment from the third statement in the inducement is, we think,

that the order being operative upon, and obeyed by, the pilot, was necessarily operative upon the Master, because he, though not under a legal obligation to take a pilot, could not safely navigate his vessel without one, and could not get a pilot other than one of the *Bengal* service. Therefore, upon the plaint, we must assume that the Defendant, intending to injure the Plaintiffs in their trade, and having a power over the pilots of the port which he could effectually use for that purpose, did consciously use that power to that end, and so invaded the Plaintiffs' legal right. It cannot, by any fair intendment, be collected from the statements of the plaint that this was in the necessary or ordinary exercise of the Defendant's power as Superintendent of marine, or in the regular discharge of his duty as a public officer. *Prima facie*, it can matter nothing to the pilot, or the officer who supplies the pilot, by what steamer the vessel is towed to sea ; and the injurious intention here alleged is, as it is in many other cases, of the essence of the action. Thus Baron *Parke*, in *Langridge v. Levy* (2 Mee & Wels. 531), speaking of actions on the case founded on deceit, says—'A mere naked falsehood is not enough to give a right of action ; but if it be a falsehood told with an intention that it should be acted upon by the party injured, and that act produce damage to him,' there is no question but that an action would lie. It may be said fraud and falsehood are *mala in se*; but the arbitrary abuse of power, to the wilful injury of another, is also *malum in se*. Assuredly, such a wanton exercise of power is less innocent than the act of shooting, which, in the ancient, as well as the more modern cases, reported in 11 East, pp. 571-4, became wrongful because done

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with the intention of disturbing the Plaintiff's decoy. The judgment of *Gibbs*, C. J., in *Sutton v. Clarke* (6 Taunt. 29), shows how a public officer, acting wantonly and oppressively in the exercise of an undoubted power, may become liable in an action on the case. But then it is said, that the damage is too remote ; or, in other words, that the damage and the loss are not, in Lord *Campbell's* phrase, sufficiently 'concatenated as cause and effect ;' and *Ashley v. Harrison*, and *Taylor v. Neri* (both reported in 1 Esp. p. 48 and p. 386) were relied upon. But the real principle of those cases, as of *Vicars v. Wilcocks* (2 Smith's L. C. 299), and of the other cases of slander collected by Mr. *Smith*, in his note on *Vicars v. Wilcocks* (2 Leading Cases, 299), is, whether the damage is the natural result of the thing done, or whether it is not capable of being attributed to some other cause. In *Lumley v. Gye* (2 Ell. & Bla. 216), *Erle*, J., also remarks on the absence of intention in those cases to cause the damage complained of ; and, assuredly, the Defendant in one of those cases may well have libelled the actress, and the Defendant in the other may well have beaten the actor, without intending to injure the manager ; and, therefore, though some doubt has been thrown on their authority by *Lumley v. Gye*, those cases may be good law, and yet not govern this case. For it is difficult to conceive a more necessary connection, as cause and effect, than that which here exists between the damage done to the Plaintiffs and the Defendant's act. The order, moreover, is insensible, if it is supposed to have been issued with any intention but that of causing the damage ; the damage followed upon it, and there is no other assignable cause which will account for that damage. Then it

is urged that the intervention of the pilot between Captain *Rogers* and the Master of the ship, and of both pilot and Master between Captain *Rogers* and the Plaintiffs, makes the damage too remote. But we are not dealing with a case like that of *Ward v. Weeks* (7 Bingh. 211), in which A. used slanderous words to B., which B. repeated to C., and thereby caused the damage to the Plaintiff; and, it was, therefore, held, that the Plaintiff could not sue A. Even in a case of slander, the rule is different if the repetition of the words is in the course of duty, as is shown in *Kendillon v. Maltby* (1 Cro. & M., 402). Here the pilot is but the officer, compelled by the rules of his service to obey the Defendant, his superior. The Master acts under the necessity imposed upon him by the Defendant, through the pilot; and the case seems to us to fall within the principle which is thus expressed by *Erle, J.*, in his judgment in *Lumley v. Gye*: ‘It is clear that the procurement of the violation of a right is a cause of action, in all instances where the violation is an actionable wrong;’ and he goes on to say, ‘He who procures the wrong is a joint wrong doer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of.’ The liability is still clearer, where, as in this case, the agent is an innocent agent. Upon the whole, therefore, though this action is in many respects of a novel character, and we have been unable to find any case which is exactly in point, we are of opinion that, on principle, it is maintainable, and that some authority for it is to be found in the old case cited by the Plaintiff’s Counsel—*Garret v. Taylor* (2 Rolles’ Rep. 162); and *Carrington v. Taylor*, and *Keeble v. Hickeringill*,

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both reported in 11 East, pp. 571, 574. We cannot think, with the Defendant's Counsel, that the two latter cases are distinguishable from the present by the circumstance that the decoy in the one was parcel of a manor, and, in the other, is described as an ancient decoy ; for the difficulty here, as we said before, does not arise from the nature of the right, but from the nature of its invasion. Again, we think, upon the authority of these cases, and of *Ferguson v. The Earl of Kinnoull* (9 Cl. & Fin. 251), that the action is maintainable, without any allegation or proof of malice. This being so, we have next to consider whether the cause of action laid has been sufficiently proved ; or, rather, for that is the form of the rule, whether there is, on any material point, that absence of evidence which can entitle the Defendant to insist on a non-suit. The issues, as to the ownership of the vessel and the authority of the Defendant over the officers of the *Bengal* pilot service, have been found for the Plaintiffs ; nor is it now contended that there was not evidence to support that finding. The other material statements in the inducements were not traversed, and we must, therefore, take it to be admitted, on the pleadings, that there were no pilots but those of the *Bengal* pilot service, and that no ship can be safely navigated in the *Hooghly* without a pilot. On this record, therefore, we have not to consider whether the existence of five or six licensed pilots would in any degree affect the right to maintain the action ; and the admission seems also to exclude the hypothesis that the Plaintiffs were not hindered in their trade, because Masters of vessels might have taken their tug and gone up or down the river without a

pilot. The question remains, whether the Plaintiffs have proved all they were bound to prove under the plea of not guilty. They have proved that the Defendant issued the order in question ; that he issued it with the avowed object of punishing the Plaintiffs for their refusal to comply with certain conditions which he had no right to impose upon them. They have proved its continuance for a certain time. They have put in the final orders of Government on this proceeding, which prove that, in issuing the order, the Defendant was so far from acting in the regular discharge of his duty, that his act was, in the opinion of his superiors, unjustifiable and an improper exercise of power. They have proved that, by the rules of the service, the pilots were bound to obey that order of their superior officer so long as it was unrevoked. They have proved that the order emanated from, and was issued on the responsibility of, the Defendant ; for the conversation with the Secretary (if the purport of it was what the Defendant represents it to be) is not tantamount to the authority of Government, supposing that the authority of Government (if given) could have relieved the Defendant from liability, or done more than give him a claim to be indemnified by his superiors. Then, as to the damage, the Plaintiffs have, unquestionably, proved that damage did result to them in consequence of the order. But the nature and effect of that evidence will be best considered with reference to the only question that remains to be determined on this rule ; namely, whether that evidence justified the award of more than nominal damages. We can see no reason why the damages which the Court gave on the trial should be reduced. We then disclaimed any intention to give those penal damages

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by which the learned Counsel for the Plaintiffs insisted the Court ought to mark its sense of the arbitrary conduct of the Defendant ; but we thought (and we endeavoured to measure the damages according to this principle) that, if the act of the Defendant was wrongful, the Plaintiffs were entitled to recover the actual loss which they had sustained in consequence of it. We had clear and positive proof of the continuance of the order, and that immediately after its issue the pilot in charge refused to unmoor a vessel if The ‘*Underwriter*,’ which had been engaged to tow, took her in tow. The Captain also has sworn that, but for the order, he might have had other engagements, but that in consequence of the order his vessel remained idle. This is entirely confirmed by every inference to be drawn from the state of trade in the port, the ordinary principles on which men act, and by the acts of the Plaintiffs, as shown in their remonstrance and appeal to Government. We gave, therefore, what, upon the evidence of the average nett earnings of the steamer when in work, would have been its probable earnings if it had been allowed to work during its period of enforced idleness. We continue to think that the evidence given of the refusal to unmoor The ‘*Daniel Webster*,’ though objected to at the time, was properly received ; but we must observe, that the proper mode of persevering in the objection would have been by moving for a new trial, on the ground of the improper reception of evidence, and that the point is not regularly raised by this rule. It may, however, be open to the Defendant to insist, in arrest of judgment, that the special damage is not alleged with sufficient particularity ; that, as in a certain well-known class of action for

slander, the names of the persons who would, but for the order, have employed the Plaintiff's steamer, ought to have been stated. But we would observe, that the question here is, not whether customers who have been wont regularly to deal at a particular shop, and whose names are necessarily known to the person who keeps that shop, have been driven from that shop; we have to deal with the case of a steamer plying for hire in a port to which ships from all quarters of the world resort, many of them for the first time. Again: the notorious existence of the order, and the first act of obedience to it, would necessarily prevent Masters of vessels from coming to hire The '*Underwriter*' in the port, and The '*Underwriter*' from making what are termed in the evidence, 'seeking trips' to the Sand Heads. It seems to us, therefore, that this case falls within the principle of *Hartley v. Herring* (8 Term Rep. 130), that the plaint alleges the special damage with as much certainty as the subject-matter is capable of, and that the damages have been correctly assessed. We repeat our regret that the delay in the rescission of the order has increased the Plaintiffs' loss and the Defendant's liability; nay, more, we are sorry that the Defendant should suffer at all, because, although we think that he took an erroneous view of the Plaintiff's conduct, and a still more erroneous view of his own position and powers, we doubt not that he acted honestly on the notions which he says prompted his conduct. But though we regret that Captain *Rogers* has not escaped the fate which generally attends on those who, without measuring their own powers or authority, Quixotically undertake to be the redressors of grievances, real or imaginary,

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this cannot influence our decision as Judges. If in our judgment the Plaintiffs have suffered a certain pecuniary loss, in consequence of an actionable wrong done to them by the Defendant, we must declare them entitled to recover that loss from him. The rule must be discharged.”

The amount of the damages recovered, Rs. 6,624, being under the appealable value, the Appellant presented a special petition to Her Majesty for leave to appeal, in which, amongst other things, he stated that he had issued the order in question, with the sanction and approval of the Secretary of the Government in the Home Department in *Calcutta*, believing that the exigencies of the public service demanded the same; that the action was brought for the wrong alleged to have been done by him to the Respondents by such order, and he submitted, that as an important principle of law was involved in the decision in the action, the amount of damages ought not to deprive him of the benefit of an appeal, and prayed that the judgment might be reversed, altered, or varied, and the verdict found for the Respondents in the action set aside, and a verdict, or a nonsuit, entered on his behalf.

Mr. *W. Field* for the Petitioner, cited *Spooner v. Juddoo (a)*.

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Their Lordships gave leave to appeal on security being given to the amount of £100, for costs.

* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. Thomas Erskine, the Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir Lawrence Peel.

(a) 4 Moore's Ind. App. Cases, 257.

The appeal now came on for hearing.

Mr. *Macaulay*, Q.C., and Mr. *W. Field*, for the Appellant.

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This is a case of first impression, arising from a prohibition issued by a public servant in the proper discharge of his duty, and without malice, to the officers of the *Bengal* pilot service employed by the Government on the river *Hooghly*, not to use the Respondents' steam-tug; or, in other words, not to deal with the Respondents in their trade or calling of steam-tug owners; and the first question is, whether the action is, in the circumstances, maintainable. To sustain such an action, there must have been either a violation by the Appellant of a legal right, or a wrongful act done by him in violation of a legal right or private duty, productive of damage to the Respondents. We contend there is neither of these requisites. The alleged right of the Respondents is not a legal right at all; it is simply a right, as owners of a steam-tug, to trade like the owners of other steam-tugs, on the river *Hooghly*, which is an open river. The wrong complained of is an order by a Government officer to the pilots under his control not to use the Respondents' steam-tug. In *Lumley v. Gye* (a), Mr. Justice *Erle* says that "the procurement of the violation of a right is a cause of action." That case is relied on by the Chief Justice in the Court below, on the assumption that there was a legal right in the Respondents to be employed, it may be in their turn, by the pilot service. If they had only a claim to be employed, there is no ground of action: but we deny that even any such claim existed. It is

(a) 2 Ell. & Bla. 232.

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admitted that there was no legal obligation on the Appellant to furnish pilots for all the vessels navigating the *Hooghly* in the service of the Government. Nor is it pretended that there was any contract between the Respondents and any other parties which the Appellant procured to be broken. The Chief Justice in the Court below states this broadly. It is admitted, also, that there was no malice; it is not charged, or alleged, or attempted to be proved: and yet, without such averment, or proof, the Court below, on the authority of *Ferguson v. The Earl of Kinnoull* (a), has held that this action could be maintained. But that case differed materially from the present, and really decided only, that when the law casts a duty upon a person, which he refuses or fails to perform, he is answerable in damages, though no malice is proved to those whom his refusal or failure injured; his neglect of duty, and its consequential injury to the party, is the ground of action. There is no such case here. *Gerhard v. Bates* (b), also relied on by the Court below, was an action for false representation, by which the Plaintiff was induced to take shares in a joint stock Company; and it was held, that the damage to the Plaintiff being shown to be the direct result of the Defendant's fraud, the Plaintiff was entitled to recover against the Defendant as for tort. The *dictum* of Lord Campbell in that case, that if the wrong and consequential loss "are clearly concatenated as cause and effect," an action is maintainable, is not applicable to the circumstances of this case. *The case of the Taylors, &c., of Ipswich* (c), and *The case of the Monopolies* (d), only

(a) 9 Clk. & Fin. 251.

(b) 2 Ell. & Bla. 476.

(c) 11 Co. Rep. 53.

(d) 11 Co. Rep. 146.

assume the right of the subject to be protected in the exercise of his lawful trade, which we don't deny; but that is very different from an assumed right to be employed in such trade. *Langridge v. Levy* (a) was a case of false representations and fraud. In *Winterbottom v. Wright* (b), Baron Alderson, referring to that case, refused to carry the principle of that decision further. So in *Howard v. Shepherd* (c). The cases of *Carrington v. Taylor* (d), and *Keeble v. Hickeringill* (e), are, we submit, misapplied by the Judges in the Court below. In those cases there was a disturbance of the enjoyment of a legal right; there is no legal right at all here. In *Sutton v. Clarke* (f), also cited in the Court below, it was held that if a person in the exercise of a public function without emolument which he is compellable to execute, acts without malice, and according to the best of his skill and diligence, and upon the best information he can obtain, does an act which occasions consequential damage, he is not liable to an action for such damage. The action must be on tort, or for breach of contract: here there is neither. The action is for an alleged damage, which was simply a refusal to allow dealing with the Respondents on their own terms. As the act complained of was done by a Government officer on behalf of, and with the sanction, of the Government, it may be a question whether an action against such officer could be entertained by a Municipal Court. *Elphinstone v. Bedreechund* (g), *The Secretary of State in Council of India v. Kamachee*

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(a) 2 Mee. & Wels. 519, and 4 Mee. & Wels. 337.

(b) 10 Mee. & Wels. 115.

(c) 11 East's Rep. 571.

(d) 9 Com. Ben. Rep. 297, 322. (e) 11 East's Rep. 574.

(f) 6 Taunt. 29.

(g) 1 Knapp's P. C. Cases, 316.

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Boye Sahaba (a), Buron v. Denman (b), Dobree v. Napier (c). We submit, therefore, that the declaration discloses no cause for action, and, even if such existed, which we deny, we further insist that the damages are excessive; and that they ought only to have been nominal.

Mr. *Montague Smith*, Q.C., and Mr. *H. Mills*,
 for the Respondents.

If the order of the Appellant was a wrongful act, it is actionable. He had the control of all the pilots in the Government service upon the river *Hooghly*, and it is impracticable for ships to navigate that river without a pilot. If the pilots disobeyed the order of the Appellant, they were liable to be punished; the obedience of the pilots to this order rendered also that of Masters of vessels necessary. The effect of their obeying the order was to prevent the owners of 'The "*Underwriter*"' obtaining any employment in their lawful trade or calling. This the Appellant knew, his avowed object being punishment of the Respondents for refusal to tow under Government certificate. Now, the issuing such an order was an improper exercise of his power, and a tortuous act as against the Respondents; being done without lawful justification and with the intention of damaging them. The plaint which sets forth these facts discloses a good cause of action, and is sufficient in law. It avers that the Respondents were damaged in their trade, and in the lawful use of their property, by the order issued by the Appellant, who, as against them, is thereby a wrong doer, and that such order was

(a) 7 Moore's Ind. App. Cases, 476. (b) 2 Exch. Rep. 167.

(c) 2 Bingham N. C. 781.

issued intentionally, authoritatively, and with the design of damaging the Respondents. The judgment, we submit, was well founded upon these grounds.

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First, the damage was the effect of the act of the Appellant; that is quite clear, and is sufficiently averred. Now, the great principle of law is, that every man must be considered to contemplate the probable consequences of his own act, *Townsend v. Walker* (a), *Ferguson v. The Earl of Kinnoull* (b), or the act of his agent. *Jarmain v. Hooper* (c), *Bowles v. Senior* (d), *Childers v. Wooller* (e). The damage here was immediate, and, therefore, actionable; it is not, as in the case of a slander, *Vicars v. Wilcocks* (f), too remote. In *Parkhurst v. Foster* (g), Lord Holt says, "If a man does an unlawful act, he shall be answerable for the consequences of it, especially where the act is done with intent that consequential damage shall be done."

Secondly, the damage was done to the legal right of the Respondents to prosecute a lawful trade, namely, the hire and use of their steam-tug; and this is *prima facie* actionable. He that hinders another in his trade or livelihood is liable to an action, else slander affecting a man's trade would not be actionable. *Keeble v. Hickeringill* (h). And, though no action may lie for a public nuisance, yet if a private injury is sustained thereby, an action will lie. *Iveson v. Moore* (i), *Rose v. Groves* (k), *Wilkes v. Hungerford Market Co.* (l),

(a) 9 East, 296.

(b) 9 Clk. & Fin. 251.

(c) 6 Man. & Gr. 827.

(d) 15 Law J. Q. B. 231.

(e) 29 Law J. Q. B. 129.

(f) 2 Smith's L. C. 300 ; 8 East, 1.

(g) 1 Ld. Raym. 480.

(h) 11 East, 575-6.

(i) 1 Ld. Raym. 486.

(k) 5 Man. & Gr. 613.

(l) 2 Bingh. N. C. 281.

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Dobson v. Blackmore (a). These authorities show that the law recognizes that description of right in individuals, in respect of which the special damage is claimed, and that it was actionably wrong to inflict that sort of damage.

Thirdly, as the damage done flowed from the Appellant's acts, by which he intended to damage the Respondents in their use of a lawful right, such act was wrongful on the part of the Appellant, and made him liable to an action. *Gregory v. The Duke of Brunswick* (b), *Millar v. Taylor* (c), *Pasley v. Freeman* (d), *Langridge v. Levy* (e), *Mostyn v. Fabrigas* (f), *Keeble v. Hickeringill* (g). Com. Dig., tit. "action on the case for misfeazance," A. Every loss or damage occasioned by the wrongful act of another is actionable. *Ashby v. White* (h), *Perring v. Harris* (i), *Dean v. Clayton* (k), *Bird v. Holdbrook* (l), *Ferguson v. The Earl of Kinnoull* (m). This is not a case of *damnum absque injuria*; if the Appellant so contends he must make out such position. It is not as where a Defendant carrying on an offensive trade, but in a proper manner, and in a proper place, in pursuance of a previous right acquired, is protected. *Rich v. Basterfield* (n), *Hole v. Barlow* (o). Nor is this a case where some other maxim of law comes into play and prevents the Appellant from being actionable. *Revis v.*

(a) 16 Law J. Q. B. 233.

(c) 4 Burr. 2303.

(e) 2 Mee. & Wels. 579.

(g) 11 East, 574.

(h) Ld. Ray. 938, 1. Smith's L. C. 105.

(i) 2 Moo. & Rob. 5.

(l) 4 Bingh. 628.

(n) 16 Law J. C. P. 273.

(b) 6 Man. & Gr. 205.

(d) 2 Smith's L. C. 62.

(f) 1 Smith's L. C. 528.

(k) 7 Taunt. 489, 495.

(m) 9 Clk. & Fin. 251, 310, 321.

(o) 27 Law J. C. P. 207.

Smith (a), Henderson v. Broomhead (b), Barber v. Lessiter (c), Lumley v. Gye (d).

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Lastly, no averment of malice was necessary; it is not like the case of Judge acting or alleged to have acted, from corrupt motives, but of a wrong committed which has worked damage to the Respondents. *Ferguson v. The Earl of Kinnoull (e), Saxon v. Castle (f)*, and with regard to the amount of damages, the special damage averred is sufficient to let in the proof of loss of trade given; there is no ground for saying they are excessive.

Mr. Macaulay, Q.C., in reply.

The judgment of their Lordships, prepared by Sir *John T. Coleridge*, was now delivered by

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The Right Hon. Dr. LUSHINGTON.

This was an appeal from the Supreme Court of *Calcutta*. The Respondents were the Plaintiffs in that Court, and their plaint recited that they, before the committing of the grievances complained of, had been, and then were, the owners of a steam-tug called 'The "*Underwriter*"' employed for hire in towing ships to and from the port of *Calcutta*, and in the receipt of large profits from such employment; and that the Defendant was an officer in the public service of the East India Company, having the name and style of the Superintendent of marine, and that, as such, he was invested with the chief authority and control over all the officers of the *Bengal* Pilot service employed by the Company on the *Hooghly* river for the purpose

(a) 18 Com. Ben. Rep. 126.

(b) 28 Law J. Exch. 360.

(c) 29 Law J. C. P. 161.

(d) 2 Ell. & Bla. 216.

(e) 9 Clk. & Fin. 321.

(f) 6 Ad. & Ell. 652.

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of piloting vessels thereon to and from the said port; and that the said officers of the *Bengal* pilot service were the only pilots who, upon the said river, exercise the calling of pilots, and take pilotage charge of inward and outward bound ships; and that in consequence of the perils of the navigation, no ship can with safety proceed inwards or outwards, or be duly navigated, except in charge of a competent pilot. After these recitals, the plaint charged that the Defendant wrongfully and unjustly contriving and intending to injure the Plaintiffs, and to prevent them from continuing to employ their said steam-tug, wrongfully and injuriously issued and published a certain order addressed to the said officers of the *Bengal* pilot service, whereby he, as such Superintendent of marine, strictly prohibited them from allowing the said steam-tug to take any ship in tow of which they should have charge. It then stated the period during which the order remained in force; the deprivation of employment during that time; and the consequent loss of profit, laying the damage at Rs. 20,000. To this plaint the Appellant pleaded three pleas, on the first only of which, being the plea of not guilty, the question before their Lordships arises. The allegations in the inducement by way of recitals must be taken to have been admitted by the Defendant; and supposing the direct allegations which are in issue to have been proved, in such sense as to make the action maintainable, no question was made before us as to the amount of the damages awarded: the point for consideration, therefore, is, whether upon the evidence in the case this action is maintainable.

As their Lordships view the evidence, the facts appear to be the following:—The *Bengal* pilots are

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an organised body, under the control of the Superintendent of marine, which office, at the time in question, was filled by the Defendant. The form by far the larger part of the *Calcutta* pilots, and on them devolves the almost indispensable duty of piloting vessels up and down the *Hooghly* to and from the sea and port of *Calcutta*. Tugs are constantly required for bringing vessels up; and the Plaintiffs were owners of one, a steam-tug, The "*Underwriter*" employed in this service. For such service there are two rates of payment, one called the Government certificate, in which the amount is regulated by a tariff according to the time employed; the other depending on the special contract between the parties. On the 20th of *September*, 1857, when the mutiny in *India* was in full vigour, Her Majesty's ship "*Belleisle*" entered the *Hooghly*, bringing troops for the public service. The Captain of The "*Underwriter*," *Fox*, who was seeking employment, went on board and offered to take her up. At this time a *Bengal* pilot was in charge of her. *Fox* declined to take her on the terms of the Government certificate, and asked a much larger sum, first Rs. 3,000, and finally Rs. 2,500. The Captain, not choosing to incur the responsibility of agreeing to this demand, telegraphed once and again to *Beadon*, the Secretary to the Government of *India*, stating, on the second occasion, the demand, that his pilot required a powerful tug, and asked what amount he might offer. On the receipt of this second application, Mr. *Beadon* communicated to the Defendant, with a letter stating what had passed, and concluding with these words:—"What had better be done?" The Defendant immediately went to *Beadon*, and gave him his opinion that the charge was exorbitant; that

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it was *Beadon's* duty to take steps to prevent such charges being made for ships coming in with troops; that the rate of charge might otherwise increase from day to day with the increasing necessities of the Government; and added, that if he left the matter to him, he would proceed to *The Bankshall* (the place of rendezvous for the *Bengal* pilots) and direct one of the officers to see the owners of the tug, and tell them that if they did not send down immediately an order to take the troops in tow, he would issue an order to the officers of the pilot service, strictly prohibiting them from allowing *The "Underwriter"* to take any ship in tow of which they had pilotage charge. To this *Beadon* answered, "I think you would do right;" and so left it with the Defendant to dispose of the matter. What the Defendant said he would do, he immediately did. The Government terms were still refused by the Plaintiffs, and the service was unperformed by them. Whereupon, on the 22nd of *September*, by the direction of the Defendant, the order complained of was issued, and remained in force until the 19th of *October*, when, by the direction of the Government, it was rescinded; and it is for the loss of employment during this interval, that the action has been brought and the damages awarded.

On this state of facts it does not appear to their Lordships material to consider whether the demand made on the part of the Plaintiffs was exorbitant or not, nor whether the opinion expressed by the Defendant, and on which he subsequently acted, was founded in good policy, or otherwise. Neither does it seem to them to conclude the question in the action, that the act complained of is to be considered as the act of the Government, and that in the part which

the Defendant took in it he acted only as the officer of the Government, intending to discharge his duty as a public servant with perfect good faith, and with an entire absence of any malice, particular or general, against the Plaintiffs. For if the act which he did was in itself wrongful, as against the Plaintiffs, and produced damage to them, they must have the same remedy by action against the doer, whether the act was his own, spontaneous and unauthorized, or whether it were done by the order of the superior power. The civil irresponsibility of the Supreme power for tortuous acts could not be maintained with any show of justice, if its agents were not personally responsible for them; in such cases the Government is morally bound to indemnify its agent, and it is hard on such agent when this obligation is not satisfied; but the right to compensation in the party injured is paramount to this consideration. Neither in the case of damage occasioned by a wrongful act, that is, an act which the law esteems an injury, is malice a necessary ingredient to the maintenance of the action: an imprisonment of the person, a battery, a trespass on land, are instances, and only instances, in which the act may be quite innocent, even laudable, as to the intention of the doer, and yet, if any damage, even in legal contemplation, be the consequence, an action will lie.

But the foundation of every action of tort, apart from the question of malice, is an act wrongful, and which may be qualified legally as an injury. This position is not contravened in the very able and learned judgment of the Court below; indeed, it is assumed as the principle of decision, and the wrongful act relied on is stated to be, the invasion of "the right

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of the Plaintiffs to employ their vessels in towage; in other words, the right of exercising their lawful trade or calling, without undue hindrance or obstruction from others." No doubt an act which, *prima facie*, would appear to be innocent and rightful, may become tortuous if it invades the right of a third person. A familiar instance is, the erection on one's own land of anything which obstructs the light of a neighbour's house: *prima facie*, it is lawful to erect what one pleases on one's own land; but if by twenty-years' enjoyment, the neighbour has acquired the right to the unobstructed transmission of the light across that land, the erection of any building which substantially obstructs it, is an invasion of the right, and so not only does damage, but is unlawful and injurious.

The question then is, whether, in this sense, the Defendant has been guilty of a wrongful act. On the one hand, the Government has frequent occasion to have vessels towed up the river, and it desires to have this done by the owners of towing-vessels on certain terms which it believes to be just; and it keeps in its service a body of pilots, who have the charge of vessels coming up the river; and it is assumed that practically, the discretion, for the time being, of employing the particular towing vessel that is to bring up a ship, is vested in the pilot who has her in charge. The Plaintiffs decline to deal with the Government on the terms which it desires to deal on, and in a particular case insist on what appears to the Government not only to be an unreasonable demand in itself, but likely, as a precedent, to be injurious to the public interests, if yielded to in this particular instance. If the Plaintiffs have the right, as undoubtedly they have, of prescribing what terms they please for the

services they are to render, it cannot be doubted that the Government has an equal right to accept or refuse to deal with the Plaintiffs on those terms: to say, "We will employ you only if you will accept such or such a remuneration." And, if the prohibition complained of had been limited to pilots in charge of vessels in the public service, we suppose no one would have imagined for a moment that there was anything wrongful in it, or that any action could be maintained on account of it, however prejudicial its consequences might have been to the Plaintiffs' business; nor could it have made any difference if there were no vessels to be towed up but those in the service of the Government, although the consequence would have been directly a total loss of employment by the Plaintiffs; for their right to exercise their calling must be understood only as co-extensive with, and not as overriding, the right of the public or of individuals to deal with them or not, at their pleasure: the right to buy or to refuse to buy is as much to be regarded as the right to sell or to refuse to sell.

But the prohibition certainly goes beyond this: it forbids the officers of the pilot service from allowing The "*Underwriter*" to take any ship in tow of which they have pilotage charge; and the question is, whether this difference in extent makes it, as against the Plaintiffs, wrongful. Their Lordships are of opinion that it does not. For the interests of the community, and without any legal obligation, the Government has organized a body of pilots; it does not appear that any law forbids the employment of a pilot who is not of that body, and, indeed, it was proved that there were other pilots exercising their calling in the port of *Calcutta* on whom the Government prohibition

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would have had no effect. The Government certainly, as any other master, may lawfully restrict its own servants as to those whom they shall employ under them, or co-operate with in performing the services for the due performance of which they are enrolled and taken into its service. Supposing it had been believed, that The "*Underwriter*" was an ill-found vessel, or in any way unfit for the service, might not the pilots have been lawfully forbidden to employ her until these objections were removed? Would it not, indeed, have been the duty of the Government to do so? And, is it not equally lawful and right when it is honestly believed that her owners will only render their services on exorbitant terms? As regards individual owners of vessels, of all but those employed on its own account, the Government, by its pilots, co-operates with the Plaintiffs in the service of bringing their vessels safely into port ; may it not refuse that co-operation so long as it believes the demand made by them unreasonable, and likely to be prejudicial to its own interests, that is, the interests of the public? Their Lordships think this question can admit of only one answer, and if so, the prohibition issued by the Defendant in its whole extent was a lawful act, and did not interfere injuriously with any right of the Plaintiffs.

It will be observed that their Lordships are only dealing with a case in which no malice, in the most general sense of the term, is imputed, or proved against the Defendant. It is unnecessary to consider what would have been their judgment in a case in which the Defendant had given the same advice to the Government, and done the same act towards the Plaintiffs from any indirect motive, or with direct

malice against them. It is enough to say, that the decision of such a case would turn on totally different principles from the present.

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It will be observed also that their Lordships' reasoning identifies the act of the Defendant with the approbation of the Secretary to the Government ; and they do this, not forgetting his letter to the Defendant, dated on the 15th *October*, in which the Defendant is censured for his act, and directed to recall it ; for their Lordships think that the evidence of the Defendant, uncontradicted by the evidence of *Beadon*, clearly establishes that the Defendant acted with his approbation. To him application had first been made for directions by the Captain of The "*Belleisle*," and he sought advice of the Defendant, accepted the advice which was given in good faith, and could not have been withheld without breach of duty ; and if so, the character of the act cannot be changed by the change of opinion subsequently manifested, or by the censure which it was thought right to inflict upon the agent.

This case was disposed of in the Court below in a very learned and elaborate judgment, to which their Lordships have given the full consideration it deserves, though they cannot accede to all the conclusions of that judgment. The appeal has been very ably argued at the Bar ; but their Lordships have not thought it necessary to review and distinguish the many cases cited, either in the judgment of the Court below or in the argument. It seems to them that when the legal principles to which they have adverted are applied to the facts of this case, its decision turns on a very plain and elementary point : it is essential to an action in tort that the act complained of should,

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under the circumstances, be legally wrongful as regards the party complaining ; that is, it must prejudicially affect him in some legal right ; merely that it will, however directly, do him harm in his interests, is not enough. Cases are of daily occurrence in which the lawful exercise of a right operates to the detriment of another, necessarily and directly without being actionable. The present case appears to their Lordships to be no more, and they will, therefore, humbly advise Her Majesty that the judgment of the Court below ought to be reversed, and that the costs of the appeal should be borne by the Respondents.

MAHOMED BAUKER HOOSSAIN KHAN }
 BAHADOOR - - - - - } *Appellant,*

AND

SHURFOON NISSA BEGUM - - - - - *Respondent.**

On appeal from the Supreme Court at Madras.

Mahomedan law—Legitimacy—Presumption of—Circumstances justifying—Proof of marriage—Necessity.

By the Mahomedan law, the legitimacy of a child of Mahomedan parents may be presumed, or inferred from circumstances, without any direct proof either of a marriage between the parents, or of any formal act of legitimation.

In the absence of evidence or circumstances sufficient to found such a presumption, or inference, a claim by a party as a legitimate son to share in an intestate's estate dismissed.

3rd & 4th
 Feb., 1860.

THE question in this case was one of legitimacy, and related to the right of the Appellant to three-

* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. The Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

eighths of the estate of *Shasavar Jung Bahadoor*, deceased. The parties were Mahomedans, and inhabitants of *Madras*, and the Appellant claimed as the brother of the deceased. The case of the Respondent, the infant daughter and only child of *Shasavar Jung Bahadoor*, was, that the Appellant was not his legitimate brother, but was the offspring of a slave girl, brought up by one of the *Nicka* wives of the father of the deceased, *Shasavar Jung Bahadoor*, and, as such, was not entitled to a share of his estate.

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The Bill was filed by *Syed Fareed*, the Respondent's grandfather and next friend in the Supreme Court at *Madras* against *Mayroon Nissa Begum* and *Madar Ool Oomrah Bahadoor*, alleging that *Shasavar Jung Bahadoor* died on the 24th of *May*, 1856, intestate, leaving the Defendant, *Mayroon Nissa Begum*, his *nicka* and only wife, and the Respondent, his daughter by *Mayroon Nissa Begum*, an infant, him surviving; that the Appellant claimed to be a brother of the intestate, and a sharer in his estate, which right was denied, and that after certain proceedings had been taken on the Ecclesiastical side of the Supreme Court, letters of administration to the estate of the intestate were granted by that Court to the Defendant, *Mayroon Nissa Begum*, as his widow; and the Bill prayed, that the usual accounts might be taken of the intestate's estate, and that the Defendant, *Mayroon Nissa Begum*, as such widow, might be declared entitled to receive one-eighth, and the Respondent, as such daughter, might be declared entitled to receive one-half of the estate and effects of the intestate; and that it might be referred to the Master to inquire whether there were any other relatives of the intestate entitled to the remaining three-eighths of the

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residue: and in default thereof, that the Respondent and the Defendant, *Mayroon Nissa Begum*, might be declared entitled to such remaining three-eighths in proportion to their respective shares as aforesaid.

The Defendants, by their answers, admitted the facts stated in the Bill.

The suit came on to be heard on the 9th of *February*, 1858, when the Supreme Court referred it to the Master to inquire and report, whether the Appellant was a brother of the intestate; and for that purpose the Appellant was to be at liberty to go before the Master.

The Appellant left with the Master a state of facts, which alleged that, *Shasavar Jung Bahadoor* was the son of *Oomdut Ool Oomrah*, a former *Nawab* of the *Carnatic*, then deceased; that *Oomdut Ool Oomrah* married, in the form usual amongst Mahomedans for performing *Nicka* marriages, to one *Ameen Sahiba*, alias *Buddee Beebee*; that the Appellant was the only issue of that marriage and was the son of *Oomdut Ool Oomrah*, by *Ameen Sahiba*, his *nicka* wife, and was, therefore, the brother of the intestate; that the Appellant had, from the date of his birth, been acknowledged, treated, and received by the Governors in Council in *Madras*, by the *Nawabs* of the *Carnatic*, his relations, and by the intestate in his life, and by his relations and friends, as the son of *Oomdut Ool Oomrah*, and as the brother of the intestate. That the Appellant and the intestate were, on the death of their father, *Oomdut Ool Oomrah*, on the representation of the family of *Oomdut Ool Oomrah*, on the 29th of *September*, 1801, acknowledged by Lord *Clive*, the then Governor of *Madras*, to be the sons of *Oomdut Ool Oomrah*, and a pension of Rs. 10,000,

was granted to each of them, *Shasavar Jung Baha-door* and the Appellant, as the *nicka* sons of *Oomdut Ool Oomrah*, which pension was still paid to the Appellant; and it further alleged that the Appellant had been admitted by the Defendants, *Mayroon Nissa Begum* and *Madar Ool Oomrah*, to be the brother of the intestate, on the hearing of an Ecclesiastical suit in the Supreme Court, in which her right as widow of the intestate was established and declared, and also by *Madar Ool Oomrah*.

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The Respondent also left a state of facts with the Master, which stated that the Appellant was not the brother of the intestate, and was not one of the legitimate sons of *Oomdut Ool Oomrah*, formerly *Nawab* of the *Carnatic*. That the Appellant was the son of a slave girl, named *Nurgees*, otherwise called *Ameen Sahiba*, by *Oomdut Ool Oomrah*, and was brought up by *Chattoore Begum*, one of the *nicka* wives of *Oomdut Ool Oomrah*; that *Ameen Sahiba* was a slave girl in the establishment of *Chattoore Begum*, and always lived with her; was not the *nicka* wife of *Oomdut Ool Oomrah*, and never had any establishment of her own; while all the other wives of *Oomdut Ool Oomrah* had. That the intestate never acknowledged the Appellant as his brother. That he kept himself aloof from the other members of the family. That *Oomdut Ool Oomrah* had one *shadee* wife, *Doolary Begum*, and four *nicka* wives, namely, *Coolsoom Begum*, *Chattoore Begum*, *Mahtaub Begum*, and *Hyath Begum*, and no others. That on the death of *Oomdut Ool Oomrah*, *Doolary Begum*, as the *shadee* wife of *Oomdut Ool Oomrah*, received a pension of Rs. 24,000, annually, from the Government of *Madras*; and *Coolsoom Begum*, *Chatoor Begum*, *Mahtaub Begum*, and *Hyath*

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Begum, as the *nicka* wives of *Oomdut Ool Oomrah*, received a pension of Rs. 5,000, each annually from the Government of *Madras*. That *Ameen Sahiba* was maintained and supported by the Appellant for some time, but that he afterwards refused to support her, in consequence of which refusal *Ameen Sahiba* complained to the Government agent that the Appellant, who was in the receipt of Rs. 833, from Government, did not support her, and prayed that the Government would order him to maintain her. That the Government agent, in a letter dated the 8th of *December*, 1840, addressed to the Appellant, directed him to pay his mother, *Ameen Sahiba*, the sum of Rs. 50, monthly.

The evidence was contradictory. The Appellant adduced evidence before the Master in support of his state of facts, and, amongst other documents, put in an extract from the records of Government, containing a copy of a letter, dated the 3rd of *October*, 1801, from the then Governor General to *Uzeen ul Dowlah*, the *Nawab* of *Arcot*, transmitting a statement of the allowance to be made to the family, and requesting the *Nawab* to furnish him with a statement of the different receipts to be granted for the allowances, and the statement sent in return, in which statement it was insisted that the Appellant's name was returned as a *naika* son of *Oomdut Ool Oomrah*. It was deposed by two of the witnesses, sisters of *Oomdut Ool Oomrah*, who were examined *viva voce* in support of the Appellant's state of facts, that they were present at the *nicka* marriage of *Ameen Sahiba* with *Oomdut Ool Oomrah*, and that the Appellant was the issue of that marriage, and that he was always treated by *Oomdut Ool Oomrah* as his legitimate son, and had

as such been received by the witnesses and other members of the family. The Government agent and paymaster of the *Carnatic* stipends was also examined by the Appellant, and he stated that the Appellant and *Shasavar Jung Bahadoor* had both the same yearly allowance as *nicka* sons of *Oomdut Ool Oomrah*, and that the Appellant had been treated as a *nicka* son by the British Government.

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The Respondent adduced evidence in support of her counter state of facts, and relied upon a document, being the reply of the *Nawab* of *Arcot* to the letter of the Governor General, forwarding a memorandum of the receipts to be taken, in which the Appellant was thus described:—"Receipt under the seal of *Raukul ul Nissa*, alias *Chattore Begum*, with her son as follows:—"For *Bauker Hussan Khan* (the Appellant) Rs. 833. 5½a.; for *Chattore Begum*, Rs. 416. 10½a." The Respondent also tendered an extract from the records of Government, being a copy of a letter dated the 7th of *October*, 1820, (a) from *Nawab Azeem Jah*, deceased, the then *Nawab* of the *Carnatic* to the Government, stating that *Chattore Begum*, who received the Government stipend of Rs. 416. 10½a., had died on the 15th of *September*, and that the stipend and that of *Mahomed Bauker Hoossain Khan* (the Appellant), son by a concubine of the late *Nawab*, had been paid on one receipt, and that then the stipend of *Mahomed Bauker Hoossain Khan*, amounting to Rs. 833. 5½a., would be payable on his separate receipt. This document was objected to, and was not admitted, the Master considering it irrelevant, and the Appellant no party to it. Evidence was also adduced by her to the effect that the Ap-

(a) See *post*, p. 150.

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pellant might have been regarded as the *nicka* son of the *Oomdut Ool Oomrah*, as he had been adopted by *Chattore Begum*, the childless *nicka* wife of the *Nawab*, and brought up by her as her own son, but that he was the offspring of a slave of *Chattore Begum* named *Ameen Sahiba*.

The Master by his report found that the Appellant was the son of the *Oomdut Ool Oomrah* by his *nicka* wife, *Ameen Sahiba*, and that he was the legitimate brother of the intestate.

The Respondent filed two exceptions to this report; first, that the Master had rejected the letter of the 7th of *October*, 1820, whereas he ought to have admitted it as evidence for the Respondent; and secondly, that the Master had found the Appellant to be the brother of the intestate, whereas the Master ought to have found that the Appellant was not the brother of the intestate.

These exceptions were argued on the 2nd of *July*, 1858, before the Chief Justice, Sir *Christopher Rawlinson*, and allowed. The reasons of the Chief Justice for making the Order allowing the exceptions, transmitted to the Privy Council, were as follows:—
 “First exception, as to the document purporting to be a translation of a letter or note from the late *Nawab Azeem Jah* to the Government, bearing date 7th of *October*, 1820, was tendered on behalf of the Plaintiff as a declaration by the head of the family concerning pedigree, in the same way as the other letters of the *Nawab* in 1801 had been admitted on the other side. It was admitted before the Master to be a true translation; it came from its proper custody, namely, the Government office. No objection was taken that a further search for the original

Persian note was necessary. Upon the above state of facts, I was of opinion that the document should have been admitted, whatever might have been the case, had other objections been taken; but I added, that when deciding the second exception, I would consider the document as not before the Court. Second exception.—The allowance of this exception turned on the fact, whether the claimant, *Mahomed Bauker*, was the legitimate brother of *Shasavar Jung Bahadoor*, deceased; or, in other words, whether his mother the girl *Buddee Beebee*, alias *Ameen*, was the lawful wife of the *Oomdut Ool Oomrah Bahadoor*. To establish this fact, two old female witnesses, relatives of the *Nawab*, deposed to the fact of a marriage having taken place as far back as 1800, if at all; they gave no dates. There was no other witness to, or any other evidence of, the marriage, save the above direct testimony. There was not any evidence, as is usual, and might have been expected in the case of a *Nawab's* marriage, such as the attendance of the *Cazee* or some other Mahomedan officer, no fixing of the dowry, &c., while all the facts and circumstances which were beyond dispute since 1800, instead of supporting the fact of a marriage, tended most strongly to the opposite conclusion. It was proved on both sides that the alleged wife, *Ameen Sahiba*, was a poor girl, a *protege* and servant of *Chattore Begum*, one of the wives of the *Oomdut Ool Oomrah*; that after the time of the supposed marriage she continued to live with her mistress, instead of having a separate house and establishment of her own, as all the other wives of the *Nawab* had. That on the birth of her child (in 1800 or 1801) he was given to *Chattore Begum*; that on the death of the *Nawab* shortly after, in 1801,

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when the list of his family was sent in to the Government by his successor for pensions, the name of this woman nowhere appeared, either in the list of wives or of other persons entitled to any payment (see Lord *Clive's* letter of *October* the 3rd, 1801, and the *Nawab Azeen-ool-Dowlah's* answer of the 17th of *October*, 1801). It was not proved that she either received any pension or did any act claiming to be a wife from 1800 down to the day of her death, about fifty years afterwards, but that she was dependent on what she could obtain from her son *Mahomed Bauker*. In support of the claimant's case, it was also urged that his name appears in the *Nawab's* list of the 3rd of *October*, 1801, as a '*nicka* son' of the late *Nawab*. True it is that it does, but the letter of *October* 3rd, taken as it should be, together with the answer of the 17th of *October*, destroys rather than strengthens his case; for though in the first list of *October* 3rd, *Mahomed Bauker's* name appears in the list of *Nicka* sons, the name of his mother nowhere appears either in the list of wives or elsewhere; while in the list of *October* 17th, he is described as the son of *Chattore Begum*, under whose seal the receipt for his and her pension is to be given, thus explaining how the *Nawab* came to insert his name in the first list as a '*nicka* son,' viz., because he considered *Chattore Begum*, to be his mother. On weighing the whole of the above evidence I could not come to the conclusion that the claimant had established the marriage of his mother *Ameen*, or his own legitimacy. The girl, *Ameen Sahiba*, I consider never was the wife of the *Nawab*, though the *Nawab* was probably the father of her illegitimate child; that *Chattore Begum* not having any children of her own, took to it soon after its

birth, a proceeding to which a humble attendant would gladly consent, and would not object to his name being sent, in 1801, as a '*Nicka* son' of the *Nawab*, entitled to a pension; while the improbability of the name of a wife of a *Nawab* not being returned in the list of the family in 1801, and of her remaining, during a long life, content with such exclusion and consequent loss of all pension, the equally great, if not greater, improbability of a Mahomedan wife giving up her only son (if legitimate) to another wife,—pressed so strongly on my mind as altogether to outweigh the not very clear and wholly unsupported testimony of the two female witnesses to the marriage. In support also of the case of *Mahomed Bauker* being a brother, some evidence was adduced before the Master of admissions by *Mayroon Nissa* (the Defendant and infant Plaintiff's mother) both in this and the *Maukamah* Court, though this class of evidence was not much, if at all, relied on, when the case was before the Court. I refer to it lest it should be supposed that it had escaped my notice. Supposing, however, that such evidence could be made admissible against the infant Plaintiff, I do not think it was entitled to any weight under the circumstances of this case. The Defendant, *Mayroon Nissa*, a person of low origin, had only been married four or five years before the death of her husband, *Shasavar Jung Bahadoor*. She was, as is unfortunately too frequently the case in the East, immediately after the death of her husband surrounded by claimants, who, after disagreeing amongst themselves as to the division of the property of the infant, commenced law suits, some as friends of the infant, some for administration, &c.; no less than two or three on the present

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occasion were so commenced, one by the claimant himself, *Mahomed Bauker*, in the *Maukamah* Court. The finding in this last Court, I will only observe, is rested solely on the admissions of the claimants, none of whom had any claim except the widow, and on the fact of his name appearing in the first list of the *Nawab* of 3rd of *October*, 1801, as a '*Nicka* son;' on the small weight this is entitled to when read with the second letter of 17th of *October*, 1801, I have already remarked."

From the Order allowing the exceptions the present appeal was brought.

Mr. *R. Palmer*, Q. C., and Mr. *W. H. Melvill*, for the Appellant.

As the parties are Mahomedans, their rights are to be regulated by the Mahomedan law. By that law, a marriage, in circumstances of reputation and acknowledgment, like the present, will be presumed, and, consequently, the legitimacy of the Appellant, *Fyaz Ali Khan v. Mussumaut Fatima Khatoon* (a), *Khajah Hidayut Oollah v. Rai Jan Khanum* (b), *Jeswunt Sing-jee Ubby Sing-jee v. Jet Sing-jee Ubby Sing-jee* (c), *Mirza Qaim Ali Beg v. Mussumaut Hingun* (d), *Macnaghten* "On Mahomedan law," *Introd.* p. xxiv. and ch. vii. par. 33 *ib.* and pp. 132, 376. *Baillie*, *Muh. law of Inh.* 35. But, here the evidence of the witnesses to the marriage examined by the Appellant, two of whom were members of the family, satisfactorily establish both in law and in fact the *Nicka* marriage of *Ameen Sahiba* with *Oom-*

(a) 1 Ben. Sud. Dew. Rep. 357.

(b) 3 Moore's Ind. App. Cases, 295.

(c) 3 Moore's Ind. App. Cases, 245.

(d) 3 Ben. Sud. Dew. Rep. 152.

dut Ool Oomrah. Hearsay evidence is admissible by the Mahomedan law, if there be no formal proof of the marriage, *Macnaghten* "On Mahomedan law," Introd. p. xxiii. and ch. xii. par. 14, p. 77. At all events, we submit, that the evidence, after so long a lapse of time, was sufficient to raise a legal presumption in favour of the marriage and of the legitimacy of the Appellant, which presumption, we submit, has not been rebutted. The rule in such a case is, *Semper praesumitur pro matrimonio*, which is admitted in English Courts, *Piers v. Piers* (a). It is shown that the Appellant was acknowledged and treated by *Oomdut Ool Oomrah* as his legitimate son, and that he was recognized as such by the family, and by the Government of *Madras*. The statement that *Ameen Sahiba* was a slave is unfounded in fact.

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Sir *Hugh Cairns*, Q.C., and Mr. *Ayrton*, for the Respondent.

There are no circumstances in this case to raise the presumption of legitimacy contended for. The authorities relied upon by the Appellant's Counsel in support of their propositions do not apply. Here there is no satisfactory evidence that the Appellants' mother was the *Nicka* wife of *Oomdut Ool Oomrah*, or of any acknowledgment by him, that the Appellant was his child; on the contrary, the Respondent's evidence establishes the fact, that he was adopted by *Chattore Begum*, one of the *Nicka* wives of the *Nawab*, she being childless, and was the son of *Ameen Sahiba*, a *protege*, or dependant, living with her. The Master improperly rejected the letter dated the 7th of October, 1820, which was a statement of a deceased member of the intestate's family respecting his pedigree and, therefore, relevant to the inquiry.

(a) 2 H. L. Cases, 331.

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Their Lordships' judgment was delivered by

The Lord Justice KNIGHT BRUCE.

The question in the present appeal from the Supreme Court of Judicature at *Madras*, between Mahomedans, is, whether upon the evidence in the case, the Appellant ought to be considered as the lawful brother of *Shasavar Jung Bahadoor*, that is to say, the lawful son of *Oomdut Ool Oomrah*, a Mahomedan, formerly *Nawab* of the *Carnatic*, the Father of *Shasavar Jung Bahadoor*, who having survived *Oomdut Ool Oomrah* for more than half a century died at *Madras* in the year 1856.

The point arose in a suit, in the Court already mentioned, for administering the estate of *Shasavar Jung Bahadoor*, the decree in which, dated the 9th of *February*, 1858, directed, among other things, a reference to the Master of the Court, to inquire and report whether the Appellant was a brother of *Shasavar Jung Bahadoor*, and directed that for that purpose the Appellant (not a party to the cause) should be at liberty to go before the Master.

The Appellant, availing himself of this permission, carried in a state of facts and charge before the Master, which is in these terms:—"That the Master be directed to inquire and report to the Court whether the said *Mahomed Bauker Hoossain Khan Bahadoor* is a brother of *Shasavar Jung Bahadoor*, the intestate in the pleadings of this cause named. That *Shasavar Jung Bahadoor*, the said intestate, was the son of *Oomdut Ool Oomrah Bahadoor*, *Nawab* of the *Carnatic*, now deceased. That the said *Oomdut Ool Oomrah Bahadoor*, *Nawab* of the *Carnatic*, the father of the said *Shasavar Jung Bahadoor*, deceased, was, some three or four years prior to his death, on or

about the month of *December*, married, in the form usual amongst the Mahomedans for performing *nicka* marriages to one *Ameen Sahiba*, alias *Buddee Beebee*. That the said *Mahomed Bauker Hoossain Khan Bahadoor* was the only issue of the said marriage, and was the son of the said *Oomdut Ool Oomrah Bahadoor*, *Nawab* of the *Carnatic*, by his *nicka* wife, the said *Ameen Sahiba*, alias *Buddee Beebee*, and was born on the 10th of *June*, 1800, and is, therefore, the brother of the said *Shasavar Jung Bahadoor*, deceased. That the said *Mahomed Bauker Hoossain Khan Bahadoor* has, from the date of his birth up to the present time, been acknowledged, treated, and received by the Governor in Council in *Madras*, by the *Nawabs* of the *Carnatic*, his relations, and by the late *Shasavar Jung Bahadoor*, deceased, in his life, and by his relations and friends, as the son of the said *Oomdut Ool Oomrah Bahadoor*, *Nawab* of the *Carnatic*, and as the brother of the said *Shasavar Jung Bahadoor*, deceased. That the said *Mahomed Bauker Hoossain Khan Bahadoor*, and *Shasavar Jung Bahadoor*, deceased, were, on the death of their father, the said *Oomdut Ool Oomrah Bahadoor*, *Nawab* of the *Carnatic*, on the representation of the family of the said *Oomdut Ool Oomrah Bahadoor*, the *Nawab* of the *Carnatic*, on the 29th of *September*, 1801, acknowledged by Lord *Clive*, then Governor of *Madras*, to be the sons of the said *Oomdut Ool Oomrah Bahadoor*, the *Nawab* of the *Carnatic*; and a pension of Rs. 10,000, was granted to each of them, the said *Shasavar Jung Bahadoor*, deceased, and the said *Mahomed Bauker Hoossain Khan Bahadoor*, as the *nicka* sons of the said *Oomdut Ool Oomrah Bahadoor*, the *Nawab* of the *Carnatic*, deceased, which pension has since been and still is paid to the said

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Mahomed Banker Hoossain Khan Bahadoor. That the said *Mahomed Banker Hoossain Khan Bahadoor* has been admitted by the Defendants, *Mayroon Nissa Begum* and *Madar Ool Oomrah Bahadoor*, to be the brother of the said *Shasavar Jung Bahadoor*, the former by her Counsel and Proctor on the hearing of the Ecclesiastical suit in the Supreme Court, in which her right as widow of the said *Shasavar Jung Bahadoor*, deceased, was established and declared, and by the said *Madar Ool Oomrah Bahadoor*, in the late *Nawab's Maukamah* Court, and in certain writings under his hand."

The claim was opposed on behalf of the Respondent, the daughter and only child of *Shasavar Jung Bahadoor*, and evidence was adduced on each side in support of it and against it. Upon the whole of the evidence, the Master reported in the Appellant's favour, finding that the Appellant was the son of *Oomdut Ool Oomrah*, by "his nicka wife" *Ameen Sahiba*, and was the brother of *Shasavar Jung Bahadoor*. But exceptions to the Master's report were taken by the Respondent, and, upon argument, decided in her favour by the Supreme Court; a decision that produced the appeal now before their Lordships, and which was argued here fully and very well.

The exceptions are thus:—"First exception.—For that the said Master hath, in and by the said separate report, rejected the Exhibit C (a), mentioned and set

(a) Exhibit C.—Deposed to by *P. Nullatomby Moody*. "From his Highness the *Nawab Azum Jah*, dated 7th October, 1820. On the 15th September died *Chatoor Begum* (*Nicka* wife of the late *Nawab Oomdut Ool Oomra*), who received from the honourable company a stipend of rupees 416 10 5|8. Her stipend, and that of *Mahomed Banker Hoossain Khan*, son by a concubine of the late *Nawab*, have been paid on one receipt, and now the stipend of *Mahomed Banker Hoossain Khan*, amounting to rupees 833 5 1|4, will be payable on his separate receipt. I state this for your information, &c."

forth in his said report, and offered as evidence on behalf of the Plaintiff, in support of her state of facts and charge left in this cause on the 23rd of *April*, 1858; whereas the said Master ought not to have rejected such Exhibit C, but ought to have admitted it as evidence for the said Plaintiff. Second exception.—For that the said Master hath, in and by the said separate report, found that *Mahomed Bauker Hoossain Khan Bahadoor* is the brother of *Shasavar Jung Bahadoor*, the intestate, in the pleadings of this cause named; whereas the said Master ought to have found that the said *Mahomed Bauker Hoossain Khan Bahadoor* is not the brother of the said *Shasavar Jung Bahadoor*, deceased. Wherefore the said Plaintiff doth except to the said Master's separate report, and appeals therefrom to the judgment of this Honourable Court." And the Order allowing these exceptions is in these terms:—"The matter upon the exceptions taken by the Plaintiff to the separate report of *Charles Martin Teed*, Esquire, the Master of this Honourable Court, dated the 10th of *June* last, made in pursuance of the decree made on the hearing of this cause, and bearing date the 9th of *February* last, coming on to be argued this present day before the Honourable the Supreme Court of Judicature at *Madras*, in the presence of Counsel on behalf of the said Plaintiff and *Mahomed Bauker Hoossain Khan Bahadoor*; and the said exceptions and report being opened, upon debate of the matter, and hearing what was alleged by the Counsel on both sides; this court doth Order that the said exceptions be allowed, with costs of the proceedings had before the said Master, and of this application and Order."

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In the view that their Lordships take of the matter,

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the first exception is unimportant ; for, whether the document to which it relates be considered or not considered as part of the evidence, the conclusion as to the question of legitimacy must, according to their Lordships' opinion, be the same; and with regard to that question, their Lordships find it to be, if not established, at least highly probable, that the Appellant, who seems now to be between fifty-eight and sixty-two years of age, was born in the house of *Chattore Begum*, a *Nicka* wife of *Oomdut Ool Oomrah*, and it appears to be clear that he (the Appellant) is the son of a woman who was a *protege*, or dependant, if not a servant, of that lady. She seems to have brought up the Appellant's mother, *Ameen Sahiba*, mentioned in the report, and to have taken an interest in her. It appears likely that *Ameen Sahiba*, from a time preceding her adolescence until the death of *Chattore*, had no other home than the residence of *Chattore*, and that *Oomdut Ool Oomrah*, whether legitimately or illegitimately, was the father of the Appellant, and so, from the time of his birth, reputed generally to be; their Lordships, by using the term "reputed generally," not, however, meaning to affirm or deny that there ever was any acknowledgment of the paternity by *Oomdut Ool Oomrah*. He (*Oomdut Ool Oomrah*) died before the year 1802, and was survived for several years by *Chattore*. She was survived for several years by *Ameen Sahiba*, and since the death of *Ameen Sahiba* some years have elapsed.

More than once in the proceedings before us, *Ameen Sahiba* is described as a slave. Their Lordships, however, believe, and it has been, by the Counsel on each side, at the bar, expressly and distinctly admitted, that she was not so. Their Lordships, accordingly, for

every purpose of the present litigation, assume that *Ameen Sahiba*, during her whole life, was free.

Chattore Begum, who seems not to have had any child of her own, appears to have adopted the Appellant from the time of his early childhood, if not from the time of his birth, and thenceforth during the whole of her life to have treated him as her son; and both the Appellant and his mother lived continually, as it seems, with *Chattore* until her death—the Appellant from his birth, his mother from a time preceding that event. The Appellant's examination in support of his state of facts contains but an indistinct and indirect, if it contains any, allegation that his mother was the wife of *Oomdut Ool Oomrah*.

Proceeding on the basis of these remarks, their Lordships deem it necessary or convenient now to divide the evidence into two portions: the first consisting of the testimony of two widow ladies, named *Shurfoon Nissa Begum*, and *Fakroon Nissa Begum*, and the second consisting of all the rest of the evidence; and to consider the second portion previously to considering the first; and, in considering the second portion, to deal with it as if the first were not existing. So viewing the evidence, their Lordships are of opinion that what has just been described as the second portion of it is insufficient to support the Appellant's contention that he is the legitimate or legitimated, son of *Oomdut Ool Oomrah*. By the second portion of the evidence it is not shown that there was at any time a ceremony of marriage between him and *Ameen Sahiba*, or that she at any time claimed or professed, or represented herself to be his wife or widow, or was at any time acknowledged by him as his wife, or was by the Government or other-

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wise at any time recognized or treated as his wife or widow. Though five other ladies, as his widows, had allowances from the Government, she had none.

The case, too, thus regarded, there is no proof that *Oomdut Ool Oomrah* at any time treated, recognized, or acknowledged the Appellant as his son, and it does not (we think) help the Appellant that, soon after his alleged father's death, the Appellant, as a member of *Oomdut Ool Oomrah's* family, had a pension from the Government, which the Appellant still enjoys, and which there seems to their Lordships to be no reason in point of justice, fairness, or propriety, why he should not continue to enjoy. That pension was, with the assent and concurrence of the family of *Oomdut Ool Oomrah*, certainly allotted to the Appellant, then a minor, in very early childhood, as a son of *Oomdut Ool Oomrah*, but also as the son of *Chattore*, which, by adoption, though by adoption alone, as already mentioned, the Appellant was: nor can he, in our opinion, be taken to have had, or to be enjoying, any Government pension or Government allowance whatever, in the character of a son of *Ameen Sahiba*. It was for the pecuniary interest of *Chattore*, with whom the mother and the son were living, to represent the Appellant as *Chattore's* son, and if *Ameen Sahiba* was not a widow of *Oomdut Ool Oomrah*, it was for her interest also, and that of the Appellant, that he should not be represented as her son. Their Lordships are of opinion, that unless the testimony forming what their Lordships term the first portion of the evidence ought to be deemed credible and of some weight, the Appellant's claim fails. Is, then, *Shurfoon Nissa Begum*, or *Fakroon Nissa Begum*, a credible witness? They have deposed thus:—

Shurfoon Nissa Begum, a widow, residing at No. 25, in *Amyapah Moodelly Street*, at *Royapettah*, deposed: "I know *Mahomed Bauker Hoossain Khan*. I knew his mother and his father, who was my brother. There was a girl inside the house; he married her by *Nicka*. The *Nabob Oomdut Ool Oomrah* married by *Nicka*, *Ameen Sahiba*. Some time after the *Nicka* marriage *Bauker Hoossain* was born. Immediately on the birth of the child he was given in adoption to *Chattore Begum*. I was present at the *Nicka*. The *Nicka* was read outside. The people came in, tied a *Lutcha*, and put a nose ornament. The *Lutcha* was tied on *Ameen Sahiba*, and the nose ornament was put on her; I cannot say who by, there were so many persons present. I do not know if any of the people are alive except us two. After the *Nicka* ceremony, *Oomdut Ool Oomrah* and *Ameen Sahiba* lived as husband and wife. After *Bauker Hoossain Khan's* birth *Ameen Sahiba* was in the *Chattore Begum's* house. *Bauker Hoossain Khan* has been treated by myself as my brother's son, as my nephew. I knew *Shasavar Jung*; he was the son of my brother, *Oomdut Ool Oomrah*. *Shasavar Jung's* mother was *Koolsoon Begum*, who brought him up, and *Bauker Hoossain* was brought up by *Chattore Begum*." Cross-examined by Mr. *Wilkins*.—"Ameen Sahiba was a child of a poor man; I do not know his name. *Ameen Sahiba* was not a slave girl in the family; she was the child of a poor nobleman, who, being unable to support his child, he gave the child to be supported by *Chattore Begum*. I know this because we were in the habit of going to *Chattore Begum's* house, and she in the habit of coming to us. Upon asking *Chattore Begum*, she said it was a poor nobleman's

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child, and I bring her up; she did not say who the poor nobleman was, and we did not ask. I was present when the *Nicka* took place. I was not in the *Dewanah Khanah* when the *Nicka* was read and took place. I was among the assembly of the females. *Ameen Sahiba* died lately, about seven or eight years ago." Re-examined by Mr. *Ritchie*.—" *Ameen Sahiba* lived in *Chattore Begum's* house up to the time of her death."

Then *Fakroon Nissa Begum*, is examined. She deposed as follows: "I know *Mahomed Bauker Hoossain Khan Bahadoor*. I knew his mother; she was called *Ameen Sahiba*, but commonly known by the name of *Buddee Beebee*; she married *Oomdut Ool Oomrah* by a *Nicka* ceremony. *Oomdut Ool Oomrah* was my brother. I was present at the ceremony. This was many years ago. It took place in the *Chepauk* garden. I cannot say when *Mahomed Bauker Hoossain Khan Bahadoor* was born, but he was about a year or a year and a quarter old when his father died. I knew the late *Shasavar Jung Bahadoor*; he was my nephew; he was the step-brother of *Mahomed Bauker*; when they were young they were received as brothers and played together; when they grew up they remained separate. *Mahomed Bauker* was brought up by *Chattore Begum*, who was the mother of *Shasavar Jung*. *Mahomed Bauker* was born after the *Nicka* marriage of *Ameen Sahiba*. *Oomdut Ool Oomrah* used to call the child to him, see it and caress it, and treated him as he did *Shasavar Jung*. *Mahomed Bauker* has been received by myself and other members of *Oomdut Ool Oomrah's* family as his son." Cross-examined by Mr. *Wilkins*.—"I am 75 years old. *Ameen Sahiba* was the

daughter of a poor woman, who was not a slave girl; I do not know who the father of *Ameen Sahiba* was. I do not know if the *Cazee* was present at the time of the *Nicka* marriage. The ceremony took place outside, and the ladies were all collected inside of the house on occasion of the ceremony. I was in the assembly. I saw the *Nicka* was read; it was read in the *Dewan Khanah*; afterwards the people came where the ladies were, and congratulated each other. I was not present in the *Dewan Khanah* when the *Nicka* ceremony was read. After this was read outside, the people came in where the ladies were, and tied the *Lutch*a and put the *Nuttoo*. The *Nuttoo* was put in the nose of *Ameen Sahiba*; I do not recollect who did this. The *Lutch*a was tied on the neck of *Ameen Sahiba*; I do not recollect who tied the *Lutch*a. Before her marriage *Ameen Sahiba* was a Mussulman's child, a poor man's child; and was brought up in the house of *Chattore Begum*. *Ameen Sahiba* is dead; she lived many years after *Mahomed Bauker's* birth. I do not know anything more of the *Nicka* than I have said. I know nothing about the dowry." Re-examined by Mr. *Ritchie*.—"I did not hear the *Nicka* read. *Ameen Sahiba* was inside the *Zenanah* with the females during the whole of the marriage ceremony. *Ameen Sahiba* was of a marriageable age at the time of the ceremony. After the ceremony *Ameen Sahiba* lived in the house of *Chattore Begum*. *Chattore Begum* was the wife of *Oomdut Ool Oomrah*."

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Whatever may have induced the ladies to give this testimony, their Lordships find themselves unable to credit it. They think it very highly improbable that

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if a ceremony of marriage between *Oomdut Ool Oom-rah* and the Appellant's mother of any such kind as that stated, or of any kind, had taken place with such a degree of publicity as that alleged by the two ladies, or with anything like it, the fact would not have been proved also by some other witnesses or witness, notwithstanding the lapse of time. Nor do their Lordships believe that *Chattore* or *Ameen Sahiba* would so have conducted herself, or so acted, as they respectively appear to have done, if there had been any such marriage. The conduct of both is so strongly opposed to the notion of a marriage between the *protege*, dependant, or servant, and the husband of the protectress, patroness, or mistress, as to render it impossible for their Lordships to think that such a marriage took place, upon the foundation merely of the evidence before them. Why had not *Ameen Sahiba*, why did she not claim, a house or establishment of her own? Why did she continue in that of *Chattore*? Why not have, why not claim, an allowance from the Government? Why concede, as she seems to have conceded, her son to *Chattore*? Why rest contented or discontented in the humble and dependent, and almost, if not altogether, ignominious position in which she remained, when five wives of the Prince (her husband as now alleged) had establishments and allowances agreeing with his rank? Their Lordships think that not a single portion of the evidence of either of these two ladies can be trusted; and if that is so, there is (it cannot be necessary to repeat) no proof that *Ameen Sahiba* was ever married, nor proof that she ever represented herself as a married woman, or as a widow, nor proof

of any acknowledgment on the part of the alleged father by word or deed, by language or conduct, that he was her husband, or the father of her son.

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Their Lordships, therefore, hold that the judgment under appeal is right, unless as to costs. But in arriving at this conclusion, they wish to be distinctly understood as not denying or questioning the position that, according to the Mahometan law, the law which regulates the rights of the parties before us, the legitimacy or legitimation of a child of Mahomedan parents may properly be presumed or inferred from circumstances without proof, or at least without any direct proof, either of a marriage between the parents, or of any formal act of legitimation.

Here there is, in their Lordships' judgment, an absence of circumstances sufficient to found or justify such a presumption or such an inference.

With regard to costs, however, their Lordships do not impute to the Appellant either wilful or corrupt perjury, or subornation of perjury; and, therefore, not merely from the Master's opinion, but from the circumstances of the case also, they consider the Appellant's claim, though untenable, so excusable that they will humbly recommend to Her Majesty, that the Appellant should not be subjected to any costs (except his own) of the proceedings before the Master, or of those before the Supreme Court; that the Order before them should so far, and only so far, be varied; and that there should be no costs of the present appeal.

RANEE BIRJOBUTTEE and others - - - Appellants,
 AND
 PERTAUB SING, EDWARD AUGUSTUS
 BABOONAN, and The Government } Respondents.*

*On appeal from the Sudder Dewanny Adawlut at
 Calcutta.*

Practice—Privy Council—Dismissal of appeal for default—Restoration—Grounds for—Minority of appellants if a sufficient ground—Security for costs—Effect of dismissal of appeal on.

Appeal dismissed for want of prosecution, under Rule V. of the Order in Council of the 13th of *June*, 1853, restored, under circumstances showing that the interest of infants was materially affected; but upon condition, that the appeal should be prosecuted within a given time.

The security entered into in the *Sudder* Court for the costs of appeal to *England* is vacated by the dismissal consequent upon non-prosecution of the appeal within the prescribed time.

When an appeal is restored fresh security will be required to be deposited in *England*.

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 1860.

THIS was an application to restore an appeal which stood dismissed in consequence of no effective steps having been taken to prosecute the appeal as required by Rule V. of the Order in Council of the 13th of *June*, 1853 (a).

The petition set forth, that the decree of the *Sudder Dewanny Adawlut*, at *Calcutta*, appealed from, was made on the 13th of *August*, 1855; that the transcript was forwarded to the Registrar of the Privy

* Present: *Members of the Judicial Committee*,—The Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. The Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

(a) See Order in Council, 5 Moore's Ind. App. Cases, App. p. ix.

Council, on the 8th of *March*, 1859, and registered. That no steps having been taken in *England* to prosecute the appeal, and six months having elapsed from the lodging of the transcript record, the appeal was under Rule V. of Her Majesty's Order in Council of the 13th of *June*, 1853, dismissed without further order. The petition then stated, that the neglect to prosecute the appeal arose from the delay in the execution of a power of attorney by the Appellants to prosecute the same. That the Appellants represented the interest of infants, and having regard to the magnitude of the sum at stake, and the desire to prosecute the appeal, it was submitted, that the Appellants, or their attorneys, had not been guilty of any wilful negligence or delay, and the petition further stated that the Appellants were prepared to prosecute the appeal in due course. An affidavit by one of the attorneys engaged in the case in *India* confirmed the statements in the petition as to the delay in the execution of the power of attorney being occasioned by the death of his partner who had the conduct of the appeal.

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Mr. *Rolt*, Q.C., in support of the petition.

Mr. *Leith*, opposed.

The Lord Justice KNIGHT BRUCE:

The decision proposed to be brought under appeal was ripe for hearing in the year 1856, if not in the year 1855, and the delay, in various ways, has been so considerable that, notwithstanding the state of *India*, especially that part of *India* where this matter arises, in and since the year 1857, it is probable, to say the least, that if *Baboonan's* personal interests had been alone concerned in this matter, the application now made would have been wholly unsuccessful. Their

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Lordships, however, cannot but give some degree of consideration to the circumstance that there are infants concerned whose interests were confided to him. Now, their Lordships do not mean to go the length of saying, that where infants are concerned any degree of delay may be considered justifiable, or excusable, or such as may be passed over ; as there may be circumstances so strong as even to prevent infancy from being an apology or an excuse. Their Lordships, however, after much consideration, do not view the present case in that light, and considering the apology, or excuse of infancy, and considering the manner in which the interests of minors are involved, and the state in which the part of *India* from whence the case comes was, in and after the year 1857, they are of opinion, that on certain terms this application may be acceded to.

The Applicants, their Lordships think, must pay the costs of the present application. The Applicants, their Lordships also think, must find security to the amount of £600, to be made on or before the 1st of *December* next, and must undertake to have the appeal set down so as to be in their Lordships' list for hearing at the sittings after *Hilary* term next.

Mr. *Rolt*.—That will enable us to communicate to the parties in *India*.

The Lord Justice *Knight Bruce*.—One of their Lordships' reasons in thus deciding has been, that the security given in *India* is gone by the dismissal of the appeal. Security was given to the amount of Rs. 4,000, in *India* ; that is gone: therefore, if that money was deposited, you would be able to get it back.

Mr. *Rolt*.—I was not aware that it would have actually gone by the dismissal of the appeal.

The Lord Justice *Knight Bruce*.—We fix the amount of £600, on the hypothesis that that security is gone, and that you will obtain it back.

Mr. *Rolt*.—If the security stands, it would be £200, in addition: that would answer your Lordships' purpose.

The Lord Justice *Knight Bruce*.—That, I suppose, would be so, if that security stands; but we do not think it can stand.

The Lord Justice *Turner*.—I do not see how it can stand.

The Lord Justice *Knight Bruce*.—The authorities in *India* will be informed that we proceed upon the hypothesis that you will be entitled to have the security-money back.

By an Order in Council, it was ordered that the appeal from the *Sudder Dewanny Adawlut*, of the 19th of *August*, 1855, should be restored, and that leave should be granted to the Appellants to enter and prosecute the same, upon condition that the sum of £600, sterling, be lodged by the Appellants, or their agents, in the Registry of the Privy Council, as security for the costs of the Respondents, to stand and abide the determination or Order of Her Majesty upon the appeal, on or before the 1st of *December* next; and likewise upon condition of the Appellants undertaking to set down the appeal for hearing at the sittings of Judicial Committee, after *Hilary* term, 1861, and that, upon failure of these conditions, the appeal should stand dismissed, at the sittings after *Hilary* term, 1861, with costs, to be paid by the Appellants.

The Appellant not having complied with the above

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conditions, either by depositing the security, or prosecuting the appeal within the prescribed time, the appeal was dismissed.

MAHARAJAH SUTTEESCHUNDER ROY - *Appellant*,
 AND
 GUNESCHUNDER and others - - - *Respondents.**

On Petition from the Sudder Dewanny Adawlut at Calcutta.

Privy Council—Appeal—Valuation.

Principles upon which the Courts in *India* are to estimate the appealable value, Rs. 10,000, prescribed by the Order in Council of the 10th of April, 1838.

By a decree of the *Sudder* Court the principal sum decreed was under Rs. 10,000 ; but the Court also decreed interest. Held, that in calculating the appealable value, interest was to be added to the principal.

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THIS petition was for special leave to appeal. By the final decree of the *Sudder* Court, that Court awarded the Plaintiff the sum of Rs. 5,041, with interest. The Petitioner submitted, that if the interest awarded on the principal sum by such decree was calculated at the Court rate of interest, namely, 12 per cent. per annum, and such interest added to the principal, the aggregate amount of principal and interest would, without costs, amount to a sum considerably beyond Rs. 10,000, the prescribed appealable amount.

The petition was heard *ex parte*.

Mr. *Leith* appeared for the Petitioner.

As the same point was, in substance, involved in

* Present: *Members of the Judicial Committee*,—The Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. The Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge.

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the two next petitions, a joint judgment was given by their Lordships in the three petitions. See judgment, *post*, p. 167.

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SREE MUTTY RANEE SURNOMOYEE - - Appellant,

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MAHARAJAH SUTTEESCHUNDER ROY - - Respondent.*

On Petition from the Sudder Dewanny Adawlut at Calcutta.

Privy Council—Appeal—Valuation.

An estate, the subject of the suit, was charged with a fixed annual quit-rent of Rs. 64, which the *Sudder* Court decreed with a declaration of the right of the Plaintiff to an enhanced rent of Rs. 822. 13a. Held, that the value of the subject-matter in suit, in the circumstances, ought to be estimated as amounting to Rs. 10,000, and, upon special petition, leave to appeal granted.

In this petition the application was for special leave to appeal. The petition alleged that the Petitioner's husband and his ancestors had been in possession of land in the *Zillah Nuddea*, and held the same as a heritable tenure, at a fixed quit-rent of Rs. 64. 12a., from the successive *Zemindars* of *Pergunnah, Ookrah*, in which the lands in question were included. That in a suit brought in the *Zillah* Court at *Nuddea*, for the purpose of obtaining a decree for enhancement of the rent, the Principal *Sudder Amecn* decreed that the Petitioner was liable to pay the sum of Rs. 822. 13a. as an enhanced rent. That, as the matter was under Rs. 5,000, the *Sudder Dewanny Adawlut* refused to admit a special appeal. That the effect of the decree was, that the Petitioner

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would be compelled to pay annually Rs. 822. 13a. in lieu of the quit-rent of Rs. 64. 12a., which enhanced rent would necessarily exceed the sum of Rs. 10,000, and, it was submitted, that the whole value of the lands in dispute came within the meaning of "value of the matter in dispute" in the Order in Council, of the 10th of *April*, 1838.

This petition was heard *ex parte*.

Mr. *Leith*, for the Petitioners.

See judgment, *post*, p. 167.

GOOROOPERSAD KHOOND - - - - - *Appellant*,

AND

JUGGUTCHUNDER and another - - - - - *Respondents*.*

*On Petition from the Sudder Dewanny Adawlut,
 Calcutta.*

Privy Council—Appeal—Valuation.

Mode of estimating the appealable value. Interest given by decree to be added to the principal.

Whether interest subsequent to the date of the decree can be added, is a question for the discretion of the Judicial Committee.

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PETITION for special leave to appeal. By the final decree of the *Sudder Court*, the Petitioner was decreed to pay Rs. 5,000, with interest. The petition alleged, that if the interest awarded on the principal moneys was calculated at the Court rate, namely,

* Present: *Members of the Judicial Committee*,—The Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. The Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

12 per cent. per annum, from the time it became due, and the amount added to the principal, the aggregate amount, without costs, would amount to a sum beyond Rs. 10,000.

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Mr. *Leith*, in support of the petition.

Judgment in this and the two preceding petitions was delivered by

The Lord Justice TURNER:

The question in each of these three petitions is, whether leave should be given to appeal from the *Sudder* Court to Her Majesty in Council.

In none of the petitions has there been any application to the *Sudder* Court for such leave. The reason of there having been no such application to the *Sudder* Court, in two at least of the cases, is stated to have been, that the *Sudder* Court has proceeded upon a certain rule as to cases in which leave would be given to appeal, and that, according to the rule on which they have proceeded, leave would not have been given in those two particular cases.

It is not very clear to their Lordships on what particular grounds the *Sudder* Courts have proceeded with reference to giving or refusing leave to appeal. But their Lordships feel no doubt upon what grounds the *Sudder* Court ought to proceed in such cases. It is quite clear, in their Lordships' judgment, that the matter must be regulated by the Order in Council of the 10th of *April*, 1838, and by that Order the *Sudder* Courts are not to give leave to appeal unless the petition be presented within the time limited by the Order, and unless the value of the matter in dispute in such appeal shall amount to the sum of Rs. 10,000,

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at least ; importing, therefore, that leave to appeal is to be given in cases where the petition is presented within the prescribed period, and the value of the matter in dispute in the appeal amounts to the specified sum of Rs. 10,000.

Now, where the appeal is from the whole decree, and the decree has given an amount, including interest up to the date of the decree, which exceeds Rs. 10,000, it is clear, that the matter which is in dispute in the appeal must exceed the sum of Rs. 10,000 ; for the question to be tried upon the appeal must be whether the decree is or is not right, that is to say, whether the decree has or has not properly ordered payment of a sum exceeding Rs. 10,000. Where, therefore, at the date of the judgment the sum which is recoverable under the decree of the *Sudder* Court is an amount exceeding Rs. 10,000, there, in their Lordships' judgment, the case clearly falls within the terms of the Order in Council.

That in their Lordships' understanding, disposes of the first and third of these petitions.

The second petition is somewhat different in its circumstances. It appears to be a case in which the party applying for leave to appeal claims to be entitled to an estate, subject only, as he contends, to the payment of a fixed annual rent of Rs. 64 ; but the Plaintiff in the suit, who is in possession of the judgment of the Court below, and would be the Respondent upon the appeal, claims the right to set upon the estate any rate which he may think fit. In this case it appears to their Lordships, either that the value in dispute in the appeal must be considered to be Rs. 10,000, within the meaning of

the Order in Council, or if not that it must be within the discretion of their Lordships, whether leave to appeal should or should not be given. Taking the case to be within the meaning of the Order in Council, it is clear that the value of the matter in dispute will exceed the sum of Rs. 10,000 ; for, of course, an estate held at a quit-rent of Rs. 64, must be increased in value to an amount far exceeding Rs. 10,000, if it be chargeable with a rent of Rs. 822, the amount of the enhanced rent given by the decree. Their Lordships, however, do not think it necessary to decide whether the case falls within the meaning of the Order in Council or not. They think that, whether it falls within the Order in Council, or within their discretion, the leave to appeal ought to be given.

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Their Lordships have thus stated the reasons on which they have proceeded in these three cases, because they consider it of importance that the *Sudder* Courts should understand the rules which ought to be proceeded on in giving leave to appeal, as a contrary practice on their part drives parties into this Court to obtain the leave. They desire, therefore, that the rules which have been mentioned should be observed, and are of opinion, that in all these three cases leave should be given to appeal, and that in each case security should be given to the amount of £300. Their Lordships must not, of course, be understood to intimate that the *Sudder* Courts ought to give leave to appeal in cases in which the specified amount of Rs. 10,000 can only be reached by the addition of interest subsequent to the decree. Such cases must, in their Lordships' opinion, rest in their discretion.

G. F. FISCHER - - - - - Appellant,

AND

KAMALA NAICKER - - - - - Respondent.*

*On appeal from the Sudder Dewanny Adawlut,
Madras.*

*Champerty and maintenance—What amounts to—Practice—Pleadings
—Point not taken in—If can be noticed and enquired into by Court.*

The *Sudder Dewanny Adawlut* at Madras, dismissed a suit on the ground, that the facts disclosed a case of champerty; a question not raised by the pleadings, or in the Court below. Held by the Judicial Committee, that as that objection was not raised, or the points recorded by the Court, as required by *Madras Reg. XV. of 1816, sec. 10, cl. 3*, the dismissal upon such ground could not be maintained, as the objection, founded upon the English doctrine of champerty, ought not to be noticed by the Court upon a mere inference arising incidentally from the evidence in the suit.

K. being in urgent want of money entered into an agreement in writing with N., acting as the agent of F., for an advance of Rs. 19,000. The agreement recited that N. had undertaken to procure this amount from F., on his return, he being then absent from the place where the agreement was executed, and K. promised, in consideration of the loan, to grant N. a lease of his *Zemindary*, and it was provided that K. should, on F.'s arrival, execute a regular deed. N. could only accommodate K. with a part of the proposed loan, and as the matter was urgent, and F.'s return was expected to be within a few days, it was verbally agreed, that the remaining portion of the loan should be advanced within eight days. F. did not return till nineteen days after, when he was willing to make

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THIS was an action brought by the Appellant against the Respondent to recover the sum of Rs. 50,000, as damages for a breach of a contract entered into by the Respondent with one *Narasihma Chetty*, as the Appellant's agent, to grant him a lease of the Respondent's *Zemindary*.

The facts of this case which gave rise to the action were these:—

* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. The Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

the advance required ; but in the interim, and after fifteen days from the date of the agreement, *K.*, from pressure for money had been obliged to get the advance from another party, and had, thereupon, granted him a lease of his *Zemindary*. *N.* then brought a suit for specific performance of the agreement. He afterwards died, when his heir assigned *N.*'s interest under the agreement to *F.*, who thereupon brought an action against *K.* for breach of contract. The Civil Court awarded damages for the breach, but, upon appeal, the *Sudder* Court dismissed the suit, on the ground that the assignment by *N.*'s heir to *F.* was void for champerty.

Held: that as *N.* was only the agent of *F.*, the party really interested in the performance of the agreement, the assignment by his heir of his interest under the agreement, for the purpose of enabling *F.* to bring the suit, was not champerty or maintenance, as it was wholly unnecessary, as *F.* was suing in respect of his own interest for a breach of contract.

Held further, that as the agreement to grant the lease was incomplete in itself, and conditional upon the advance by *F.* within eight days, a delay of nineteen days, in the circumstances of the want of money by *K.* to meet his pressing demands, was an unreasonable delay, which defeated the object of the loan, and avoided the agreement to grant the lease.

By the English law, to maintain an action for champerty or maintenance, it is necessary to establish that the transaction was against good policy and justice, or tending to promote unnecessary litigation.

Where an appeal was affirmed upon wholly different grounds from those relied upon by the Court below, the dismissal was ordered to be without costs.

The Respondent was the *Zemindar* of *Amanaick-noor*, near *Madura*, and in the month of *October*, 1846, being in greatly embarrassed circumstances, and having pressing demands upon him to a large extent, he applied to one *Narasihma Chetty*, who was connected in business transactions with the Appellant, in order to obtain the loan of an immediate sum of money to procure his release from prison, and also for a loan of a further sum of money within a very short period. The total sum required by the *Zemindar* was Rs. 19,035. 2a. 7p., and *Narasihma Chetty* engaged to procure that sum on the security of a lease of the *Zemindary*, consisting of sixteen villages, and their hamlets, for ten years, at an annual rent of Rs. 19,000, out of which the lessee was to pay all the outgoings, and allow the *Zemindar* Rs. 2,000, annually for his

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maintenance. *Narasihma Chetty* had not, however, the immediate command of more than Rs. 1,000, and it was, therefore, agreed that he should advance that sum at once upon a bond, and should procure the balance from the Appellant, for whom *Narasihma Chetty* acted, and as the Appellant was not at the time in *Madura*, where this agreement was made, being then at *Ramnad*, a short distance off, but his return being immediately expected, it was arranged that a provisional agreement should be executed, by which *Narasihma Chetty* should engage to procure the advance from the Appellant on his return, when the Rs. 1,000, secured by the bond, were to be deducted, the bond cancelled, and the Respondent was to execute the lease of the *Zemindary*. The Respondent's necessities were, however, so urgent that he verbally stipulated that if the Appellant did not return within seven or eight days he should be at liberty to procure the money elsewhere.

In pursuance with this arrangement, and on the 25th of *October*, 1846, the following agreement was entered into between Respondent and *Narasihma Chetty*:—"An agreement executed by *Kamala Naicker*, the present *Zemindar* of *Ammayanaikanoor*, son a *Ramaswamy Naicker*, residing at *Pottisettepatty*, attached to the *Zemindary* of *Ammayanaikanoor*, in the *Zillah* of *Madura*, to *Narasihma Chettyar*, a dealer in silk thread, an agent of Mr. *Fischer*, residing at *Salem*, now but on circuit at *Ramnad*. Whereas I have to pay to my creditors Rs. 19,035. 2a. 7p., made up of these items, viz. Rs. 8,385. 2a. 7p., amount of the *Razenamah* filed in favour of *Moottoosamy Pillay*, the Plaintiff, in O. S. No. 15 of 1845, on the file of

the Sub-Court of *Madura*; Rs. 1,000, due, under a *Razenamah*, to *Adiyappa Chettiar*, late *Sheristadar* of the Court, and Plaintiff in O. S. No. 59 of 1844, on the file of the *Moofly Sudder Ameen's* Court; Rs. 3,400, remaining over and above the partial payment of Rs. 1,000, out of Rs. 4,400, amount of the *Razenamah* filed in O. S. No. 133 of 1845, before the *Moofly Sudder Ameen's* Court; Rs. 1,000, paid this day by you, under bond, in satisfaction of the warrant of execution issued in suit No. 216 of 1836, before the late *Zillah* Court; Rs. 1,000, borrowed of *Ramakristnan Chetty*, of *Madura*, on the security of my jewels and bond, in order to satisfy the amount of the *Razenamah* in O. S. No. 47 of 1845, on the file of the Sub-Court; Rs. 250, borrowed of the same person for sundry purposes, and for satisfying the balance of the amount of the warrant issued in O. S. No. 256 of 1836, on the file of the late *Zillah* Court; and Rs. 2,000, required, among other purposes, for the costs of the suit pending before the Court. And, whereas, you have promised to procure the said sum from the said gentleman on his return to *Madura*, in the event of your getting the sum accordingly, I shall lease to you the sixteen villages attached to my *Zemindary*, and the hamlets thereof, for ten years, commencing with the current year, for annual rent of Rs. 19,000; out of the said rent of Rs. 19,000, you should forward to the *Circar* an annual *peshkush* of Rs. 13,966. 8a. 6p. accompanied by an *arzee* and *Iroosalnamah*, and procure a receipt for me. You should pay me annually Rs. 2,000, either in coins or in kind, for my household expenses, and take a receipt from me. In consideration for the amount to

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be advanced by you to me, you shall take Rs. 2,500, annually, and enter the same upon the bond granted to you, in addition to furnishing a receipt to me for the sum. You shall, in the presence of my people, carry on the repairs of tanks of the villages to the extent of Rs. 500 and odd, and render account to me, obtaining receipt from me every year. As there are arrears of revenue due for the last *Fusly* from the villages, you shall realize the same in the presence of my people, and appropriate it to the liquidation of the debt and the arrears of *peshkush*, granting receipts to me for the same. You shall permit me to manage the taxes, contributions, and *maniyams* fixed by the *Circar* for charitable purposes, such as pagodas, *choultries*, &c. You shall continue the service *manyems* granted by the *Circar*. You shall realize from the villages and pay to me the taxes and contributions usually allowed to me for such annual festivities as *Adi*, *Kartikar*, *Depavali*, *Sankrauti*, &c. You shall not exact from the *Ryots* a greater amount of assessment than is fixed upon by Government, but shall treat me, my people, and *Ryots* with due respect. As the gentleman aforesaid is not here at present, I shall, on his arrival, execute a document in detail, on a stamped *cadjan*, in the manner dictated to by him. Thus have I executed this agreement of my own free will and accord.—*Kamala Naicker, Zemindar.*”

The Rs. 1,000, were thereupon advanced on the same 25th of *October*, 1846, and a bond and conditional mortgage of a village belonging to his *Zemindary* to *Narasihma Chetty*, dated on that day, for securing the repayment, with interest, on the 1st *November* following, was executed. The Appellant did not, however, return by the stipulated time, nor until nineteen days

from the date of the above-mentioned instrument, when he at once offered to advance the money, but the Respondent's necessities being urgent, he had, in the interim, and on the 9th of *November*, in that year, after communicating with *Narasihma Chetty*, obtained the required advance from a Mr. *Fondeclair*, to whom he executed a lease of the *Zemindary*.

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Upon this *Narasihma Chetty* instituted a suit in the Civil Court of *Madura* for a specific performance, by which he claimed the execution of a lease to himself in accordance with the above agreement. The Judge of the Civil Court, however, on the 16th of *February*, 1848, dismissed the suit, on the ground, that the agreement of the 25th of *October*, 1846, was not, under the circumstances, binding on the Respondent, and on the 21st of *October*, 1854, the *Sudder Court* upon appeal confirmed this decision, although upon different grounds, the Court intimating an opinion that the agreement was still binding.

In the year 1855, *Narasihma Chetty* died, and there-upon *Condiah Chetty*, his son and heir, executed a deed of assignment, dated the 11th of *September*, 1855, transferring to the Appellant all his title under the agreement of the 25th of *October*, 1846.

This assignment was in these terms:—"Whereas, instead of giving possession to my father of the *Zemindary* of *Ammayanaikanoor*, under the lease executed by him to my father in relation thereto, under date the 25th *October*, 1846, *Kamala Naicker*, the *Zemindar* of *Ammayanaikanoor*, attached to the *talook* of *Nelakottah*, *Zillah Madura*, fraudulently demised it under a lease to Mr. *Fondeclair*, whereas my father filed an action in consequence, and in the appeal pre-

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ferred to the *Sudder Adawlut* from it was finally decreed that the lease aforesaid was good and valid, and that as the enjoyment thereof was anticipated by the fraudulent execution of a lease in favour of Mr. *Fondeclair* by the first Defendant in that suit, the income derivable up to the term of the lease might be sued for and recovered; whereas if my father had possession as per the lease an annual income of not less than Rs. 5,000 would have been derived, exclusive of all charges of the *Zemindary*; and whereas my father is dead and I am unable to sue for and recover the sum of Rs. 50,000, derivable during the ten years of the lease at the rate aforesaid, I execute this deed of assignment to you, making over to you all right and title conferred upon me by the lease and confirmed by the decrees of the *Sudder Adawlut* regarding it, for adequate valuable consideration, inclusive of the sundry sums borrowed of you by my father on different occasions for the purpose of prosecuting the suit, and of the Rs. 2,000, borrowed likewise of you by my father under a deed of assignment on stamped paper, executed by my father on the 22nd of *October*, 1853, but which became inoperative; and accordingly put you in possession of all the documents relating thereto, authorising you to recover the amount of the profit aforesaid either by a civil action or by any other means. Thus do I execute this deed of assignment by my own free will and accord."

The Appellant on the 7th of *November*, 1855, filed a plaint in the Civil Court of *Madura*, to recover from Respondents Rs. 50,000, as damages for breach of contract.

The Respondent by his answer to the plaint, con-

tended that the suit was untenable, inasmuch as the agreement of the 25th of *October*, 1846, was an incomplete agreement, and that on its execution it had been verbally agreed that within eight days after the return of the Appellant from *Ramnad*, where he was staying at that time, Rs. 19,035. 2a. 7p. was to be paid to the Respondent by the Appellant, and if so advanced a detailed lease was to be executed on a stamped *cadjan*, and in default of such payment the contract was to be null and void; and that the Appellant having failed to advance that sum, the Respondent had rented out the *Zemindary* to the late Mr. *Fondeclair*, and thereby discharged his debts; that the suit brought by *Narasihma Chetty*, founded on the agreement, had been dismissed; that the present claim had no basis, and was vague; and lastly that the suit was opposed to sec. IX., Reg. II., of 1802, and to the principle laid down in *Macpherson's* "Civil Procedure," p. 49.

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On the 7th of *August*, 1856, Mr. A. W. Phillips, the Judge of the Civil Court of *Madura*, recorded the following points for proof by the Appellant. To file the deed of assignment, dated the 11th of *September*, 1854, and prove the same. Prove the assignees' right and title to claim for the damages. Prove the damages in detail which the assignee has sustained by the non-fulfilment of the Defendant's contract. The Respondent was to prove that the assignee possessed no right and claim for damages, and to adduce proof to combat the claim of the Plaintiff to the extent sued for, or to any portion thereof.

Witnesses were examined on both sides. The evidence was contradictory upon the point whether the period of seven or eight days mentioned in the answer

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was the time specifically agreed to by the parties to the agreement of the 25th of *October*, 1846, as the term beyond which the Respondent was not to wait for the Appellant's return to *Madura*.

The Acting Civil Judge, Mr. *A. W. Phillips*, pronounced the Court's decree on the 11th of *December*, 1856, the material part of which was in these terms:—"The Court of *Sudder Adawlut* has already declared, that as the Defendant in this case did not wait for the Plaintiff's return to *Madura*, which took place within what they considered a reasonable period, that the document of the 25th of *October*, 1846, was a valid contract, and as such binding on the Defendant, but that as he had divested himself of the power to fulfil that contract with the Plaintiff, the latter should seek his remedy, not by a suit to obtain what could not be awarded to him, but by an action for damages sustained by the non-fulfilment of the contract. The validity of the document, therefore, which the Defendant protests against, must be looked upon as an established fact no longer a subject for discussion, and all the Court has to do in the present case is to ascertain what damages the Plaintiff has sustained by its non-fulfilment;" and the Court assessed the damages at Rs. 40,000, with costs.

The Respondent appealed from this decree to the *Sudder Dewanny* Court at *Madras*, and that Court delivered judgment on the appeal on the 20th of *March*, 1858. After stating the facts of the case the judgment proceeded as follows:—"The Judges of the *Sudder Adawlut* consider that they are responsible for upholding the law in its integrity, whether a suitor may have challenged or not an attempted violation of the law. The Court are bound to see that their decisions

rest upon unexceptional and legal grounds, and they cannot pass a decree in this case without first ascertaining whether the serious imputation of champerty attaches to the action. They resolved consequently to give hearing in this matter, and have confined the addresses of the Pleaders on either side to this one question, upon the decision of which any further question would depend. It is argued on the Plaintiff's behalf that the transaction with *Narasihma Chetty's* heir, as described in the assignment, is not champerty, from the circumstance that the parties had not arranged to divide the gains of the suit. But it has been satisfactorily shown on the other side that however true, that there should be such agreement to constitute champerty as originally defined, the existing and uniform practice of the Courts is to discourage all that savors of champerty, and that the purchase of a mere right of action is now distinctly viewed as champerty. Again, it is argued that the right purchased was not a mere right of action, but that as in the disposal of the former suit by *Narasihma Chetty*, it was held that a suit for damages such as are now in question might lie, there was in effect an adjudication that *Narasihma Chetty* had a title to the damages, and the thing purchased was a judgment. The Court considers this argument to be a futile one; a suggestion that there might be a suit for damages is a very different thing from a declaration of right to damages; nor had there been any attempt to estimate such damages, or to represent as vested in *Narasihma Chetty* any title of ascertained value, admitting of transfer by sale. *Narasihma Chetty* had still to establish by suit his right to damages, and the sum of such damages, and the only thing sold under the assignment was his

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right so to sue. It is finally argued that Plaintiff only went through a form of purchase for the better assurance of his position, while in reality the contract between *Narasihma Chetty* and the Defendant was on the Plaintiff's behalf, *Narasihma Chetty* acting simply as his agent. The contract certainly contains much to countenance the idea of such agency. In the title of the deed, *Narasihma Chetty* is described as the agent of Mr. *Fischer*, of whom it is further specified, as if to account for his not being personally dealt with, that he was then at *Ramnad*. In the body of the deed it is agreed that the money to be advanced under the contract should be obtained from that gentleman on his return from *Madura*, and at the close of the deed the Defendant uses the following remarkable expression:—"As the gentleman aforesaid is not here at present, I shall, on his arrival, execute a document in detail on a stamp *Cadjan*, in the manner dictated to by him. In the suit brought by *Narasihma Chetty* to enforce the contract, he again described himself as the Plaintiff's agent. On the other hand, the assignment does not set out as it should have done, that the contract was made by the agent under authority from his principal and for his benefit. On the contrary, the lease of the *Zemindary* contracted for was to be conferred upon *Narasihma Chetty*, and when this person was asked by the Civil Judge of *Madura* to explain the particular object of his suit, whether he wished to have the contract enforced for his own benefit, or that of the Plaintiff, whom he described as his master, he put in a motion declaring his desire to be, that the lease of the *Zemindary* should be made to him individually. It is not alleged that *Narasihma*

Chetty acted thus in fraud of the Plaintiff. The suit was allowed to run its course from 1847 to 1854, through several remands, re-hearings, and re-appeals, without any such representation being made by Plaintiff, and in this suit he has explicitly subscribed to *Narasihma Chetty's* action. He says, that the lease was to have been to *Narasihma Chetty*, that the sum advanced by *Narasihma Chetty*, in consideration for the contract was borrowed from him, not that it was advanced on his account, and that the interest in the deed of contract having descended to *Narasihma Chetty's* heir, the latter had sold the same to him 'on the receipt of adequate consideration.' And he puts in the assignment as the groundwork of his suit, in which the said purchase for 'full consideration' is set forth, none of the items making up the consideration being described. The plea of agency is only now set up, and for the specific purpose of meeting the charge of champerty. The Court hold the plea to be utterly untenable in the face of the Plaintiff's formal acts and declarations against the existence of such agency. They must take the suit as presented by the Plaintiff, and he having therein based his claim upon purchase made by him of a right to sue, by that representation he must stand or fall. The Judges are of opinion, that such a purchase constitutes champerty, and the practice being one they are bound to discourage as promoting litigation, which otherwise might not arise, and the fostering of hazardous and questionable claims, they resolve to reverse the original decree, and dismiss the suit with costs."

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The present appeal was from this decree.

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Mr. *R. Palmer*, Q.C., and Mr. *Coryton*, for the Appellant. ;

First, the *Sudder* Court, in dismissing the suit on the ground of champerty, departed from the issues raised by the pleadings. No such defence was pleaded, and, therefore, cannot be noticed by the Court. *Best* "On Evidence," sec. 254 (3rd Edit.). It certainly could not in *England* under the Common Law Procedure Act, 15th & 16th *Vict.*, c. 76. Nor had the Appellant an opportunity of meeting the case upon that point, or of showing as he might have done, if his title had been impeached on that ground, the true state of the circumstances under which the title was acquired. Another fatal objection is, that this question was not put in issue by the points recorded by the Judge of the Civil Court of *Madura*. The terms of *Madras* Reg. XV. of 1816, sec. 10, cl. 3, are imperative, and declare that the Court is to record the points necessary to be established by the parties to enable the Court to take notice of an objection. A point not recorded cannot be noticed. *Srimut Mootoo Vijaya Raghanadha Gowery Vallabha Perria Woodia Taver v. Rany Anga Mootoo Natchier* (a). Neither was it competent to the *Sudder* Court to decide the question of champerty, as being a "question of fact" within the meaning of cl. 4, sec. 4, of Act, No. XVI., of 1853.—[Sir *John Coleridge*: If their Lordships should be of opinion that there was champerty, or more properly speaking, maintenance, what course ought to be taken; to remit the case or hear it upon the merits?—Sir *Hugh Cairns*, Q.C., for the Respondent: The proper course would be to remit the case.]—That would

(a) 3 Moore's Ind. App. Cases, 278.

cause delay. There are sufficient materials before the Court to decide upon the merits.

As to the question of champerty or maintenance, we submit, that the deed, dated the 11th of *September*, 1855, was in the nature of an assignment from a trustee to a *cestui que trust*, and was not in the nature of champerty or maintenance. *Sugden*, Ven. & Pur. 299 (13th Edit.), *Byrne v. Frere* (a), *Hartley v. Russell* (b), *Findon v. Parker* (c), *Wood v. Downes* (d). The Agency of *Narasihma Chetty*, for the Appellant, in the original transaction, is apparent throughout the whole of the proceedings in the suit, and, as a fact, is so recited in the agreement of the 25th of *October*, 1846, and has never yet been controverted by the Respondent. Now, the *Sudder* Court, in relying upon the alleged title asserted by *Narasihma Chetty* to sue in his own name for specific performance as being inconsistent with such agency, has given an undue weight to the form and totally disregarded the substance of the transaction. The money to be advanced was the Appellant's, and the lease of the *Zemindary*, if granted to *Narasihma Chetty*, would have been for the Appellant's sole benefit.

Sir *Hugh Cairns*, Q.C., and Mr. *W. Field*, for the Respondent.

The *Sudder* Court was in principle correct in holding that the agreement between the Appellant and *Condiah Chetty* and the assignment of *Narasihma Chetty's* interest in the suit brought by him against the Respondent, was illegal and void for champerty, as it in law conferred no right upon the Appellant to maintain this

(a) 2 Molloy, 157.

(b) 2 Sim. & Stu. 244.

(c) 11 Mee. & Wels. 675.

(d) 18 Ves. 120,

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action. *Andrews v. Maharajah Sreesh Chunder Ræe* (a). In *Prossor v. Edmonds* (b), Lord Abinger held, that a Court of Equity would give no encouragement to contracts which savoured of maintenance or champerty, though such contracts might not be within the strict legal limits assigned to such offences. *Reynell v. Sprye* (c), and in *Doe dem. Witham v. Evans* (d), a sale by an administrator of a pretended title to certain premises was set aside, and the conveyance held void as well at Common Law. as by Statute, 32nd *Hen. VIII.*, c. 9.

But, secondly, upon the merits. The Respondent was not bound by the agreement of the 25th of *October*, 1846, in the event which happened. The Respondent's necessities were so urgent that he stipulated that if the Appellant did not return within seven or eight days, he was to be at liberty to procure the money elsewhere; and as the Appellant did not return within such stipulated time, indeed, not until nineteen days after, such unreasonable delay obliged the Respondent to obtain the required advances from *Fondeclair*, and he, therefore, determined the agreement with *Narasihma Chetty*, as representing the Appellant, and leased the *Zemin-dary* to *Fondeclair*. The fact that the contract was broken by the Appellant was lost sight of by the Acting Judge of the Civil Court, who was also wrong in holding that the liability of the Respondent under the agreement was concluded by the judgment of the *Sudder* Court in the suit in that Court between *Narasihma Chetty* and the Respondent.

Their Lordships' judgment was delivered by

The Right Hon. Sir JOHN COLERIDGE:

7th March,
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This was a suit brought in the Civil Court of

(a) S. D. A. Decis. Ben. 1849, p. 340. (b) 1 You. & Coll. 481.

(c) 1 De G. Mac. & Gor. 660.

(d) 1 Com. Ben. Rep. 717.

Madura, to recover damages from the Respondent for the breach of an agreement. Judgment passed in that Court for the Appellant, and this judgment was reversed in the *Sudder Adawlut*. The present appeal is brought for the purpose of procuring a reversal of that decree.

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The facts on which the case arise are in substance these:—On the 25th of *October*, 1846, the agreement in question was entered into between the Respondent on the one hand, and *Narasihma Chetty* on the other, who is thus described in the commencement of it: “A dealer in silk thread, an agent of Mr. *Fischer*, residing at *Salem*, but now on circuit at *Ramnad*.” *Narasihma Chetty* was in truth acting as *Fischer*’s (the Appellant’s) agent, whose residence was at *Salem*, and he was at the time absent on circuit as described. —[His Lordship read the agreement, *ante*, p. 172, and proceeded.]

On the day of the execution of this instrument the Respondent also executed a Bond and a conditional mortgage of a village attached to his *Zemindary*, for a loan of Rs. 1,000, from *Narasihma Chetty*, which were then advanced, and were to be repaid on the 1st of *November* following. This was to meet one of the debts enumerated in the preceding agreement. In this transaction also *Narasihma Chetty* was acting as, and was described in the instrument to be, the “agent of Mr. *Fischer*, residing at *Salem*, but now on circuit at *Ramnad*.”

The Appellant did not return by the 1st of *November*, nor until some days after the 9th, on which day, in violation, as the Appellant alleges, of the agreement to which he claims to have been the principal party, the Respondent executed a lease of the *Zemindary* to one *Fondeclair*.

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This led to proceedings in which *Narasihma Chetty* was made the Plaintiff, for the purpose of enforcing the performance of the agreement. These proceedings failed, and the lease to *Fondeclair* was supported; whereupon the Appellant determined to institute the present action for damages, and *Narasihma Chetty* being dead, it was thought desirable for him to institute it in his own name; but the original agreement having provided that the lease should be made to *Narasihma Chetty*, and he having been the ostensible party to the previous proceedings, the following assignment was procured from his son, *Condiah Chetty*.—[His Lordship read it, *ante*, p. 175.]—The action and appeal then followed, which have been already mentioned.

The decree of the *Sudder Adawlut* did not pass on the merits, nor on any point raised in the Court below; but it having been objected that the suit disclosed a case of champerty, the Court resolved to entertain the objection; because, as they say, they thought themselves “responsible for upholding the law in its integrity;” (a) they confined the addresses of the Pleaders on either side to that one question, and decided the case against the present Appellant on that point only.

Their Lordships are clearly of opinion, that the decree of the *Sudder Adawlut* in this respect cannot be supported. The grounds on which they arrive at this conclusion make it unnecessary to decide whether, under the law which the Court was administering, those acts which in the English law are denominated either maintenance or champerty, and are punishable as offences, partly by the Common Law, and partly by Statute, are forbidden; and also, if so forbidden,

(a) See p. 178.

whether the point was in this case so raised by the pleadings, or the points for proof recorded by the Court, that it could be properly entered into. They will observe, however, in passing, that although it may be admitted that the Court would have the right, perhaps even lay under an obligation, to take cognizance, *motu proprio*, of any objection, manifestly apparent on the face of the proceeding, which showed that it was against morality or public policy; yet where, as here, that was only to be collected from the evidence by inference, and was capable of explanation, or answer by counter-evidence, it is highly inconvenient, as well as contrary to the Regulation, XV. of 1816, which regulates the practice of the Court, and may lead to the most direct injustice, to enter into the inquiry, if the issue has not been presented by the pleadings, or the points recorded for proof. But, assuming that in the present case the Court properly instituted the inquiry, their Lordships do not agree with them in the conclusion to which they conducted it.

The Court seem very properly to have considered that the champerty, or, more properly, the maintenance into which they were inquiring, was something which must have the qualities attributed to champerty or maintenance by the English law: it must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary. It was necessary, therefore, to look at the substance of the transaction, and not merely the language of the instruments. Now, here it is clear, that the Appellant was the real party to the

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original agreement, and the person really interested in its performance; he was to advance the loan; the profits that were expected to result from the loan were to be his; he might have intervened in the first instance, and conducted the litigation, which first ensued, in his own name. *Narasihma Chetty* was but an agent, contracting for the Appellant in his own name, but avowedly as agent only, not undertaking to borrow from the Appellant the money, and then lend it to the Respondent, but to procure for him the loan of it from the Appellant. All this was perfectly consistent with his being put forward as the ostensible party, with the full knowledge of the Respondent. This was the substance of the contract, and the Court should have treated the assignment from *Condiah Chetty* as merely an unnecessary precaution, unwisely adopted, perhaps, and furnishing an argument for an objector, yet not really altering the quality of the transaction, nor affecting that point on which the whole question of maintenance depended, which was this: Was the Appellant suing in respect of his own interest for a violation of a contract made with himself, or was he representing another man's interest, and suing on a contract to which he had been originally a stranger, in virtue only of the objectionable assignment? If this had been borne in mind, their Lordships think that the Court would have arrived at a different conclusion from that which they in fact came to.

Here, therefore, their Lordships would have stopped, simply recommending that the judgment should be reversed; but in the commencement of the argument it was arranged, with the consent of the Counsel on both sides, that if their Lordships

should be of opinion that the decision of the Court below could not be sustained on the grounds on which it had been based, they should proceed to consider the whole case on its merits, and finally dispose of it; a course by which it was probable that much litigation and expense might be saved to the parties.

Their Lordships have, therefore, examined the facts of this case as they appeared before the Civil Court of *Madura*. As it is indisputable that a lease of the *Zemindary* has not been granted to the Appellant, or his agent, *Narasihma Chetty*, it is clear that the Appellant ought to recover if there was ever a binding contract between the parties to grant one, unless the non-performance of that contract be in any way justifiable. The first of these must be ascertained by an examination of the agreement of the 25th of *October*, 1846, of the circumstances attending its execution, and of the remaining facts of the case. The instrument commences with a recital, that the Respondent was under an obligation to pay his creditors the sum of Rs. 19,035. 2a. 7p., made up of items of which an enumeration follows, and this enumeration shows that the money was wanted without the least loss of time, that the pressure on him was urgent. It then recites a promise from *Narasihma Chetty* to procure the amount from the Appellant on his return to *Madura*, and then it promises to grant the lease; but only "in the event of *Narasihma Chetty* getting the said sum accordingly." It then proceeds to stipulate for a number of payments to be made, things to be done, and conditions to be observed by the lessee, after the lease granted, and during the continuance of the term; and it concludes thus:

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“As the gentleman aforesaid (the Appellant) is not here at present, I shall, on his arrival, execute a document in detail, on stamped *cadjan* in the manner dictated by him.”

On the face of the instrument, it is obviously a contract incomplete in itself and conditional; nothing in it binds the Respondent to the granting of the lease, unless the money was procured for him from the Appellant on his return to *Madura*, and it is clear also that nothing in it binds the Respondent to advance the money, when he should return. Further, it is obvious that no time being specified for this return, the parties must either by some collateral agreement have fixed a day for that return, or must be taken to have contemplated, what the law would imply from their language, a return within a reasonable time, all the circumstances considered. For the Respondent setting out his urgent necessities, showing the pressure that was on him, and professedly borrowing the money, not to meet future casual or uncertain expenses, but to liquidate the debts which occasioned the pressure then upon him, it would be highly unreasonable to suppose that a return after any indefinite period, however long, could have been in the contemplation of the parties. And this conclusion is strengthened by the circumstance that there is no evidence of any previous authority from the Appellant constituting *Narasihma Chetty* his agent to make the contract; indeed, the instrument itself shows that he was not bound, that it was uncertain whether he would on his return adopt and ratify the act of *Narasihma Chetty*; and the conclusion is therefore irresistible, that the Respondent was bound to wait only for that ratification and performance until the Appel-

lant's return on a specified day, or a return within a reasonable time.

The Respondent contends that the time was fixed by a collateral parol contract, and limited to the 1st of *November*, or to eight days from the 25th of *October*; the Appellant, that the return was to be within a reasonable time, that he did not return within such reasonable time, and forthwith ratified the act of his agent, but that the Respondent had in the meantime put it out of his power to fulfil the contract, by granting the lease to *Fondeclair*.

The undisputed facts of the case are these:—

On the 25th of *October*, the date of the agreement in question, the Respondent executed the mortgage and bond to *Nārasihma*, as already stated. This appears to their Lordships to have been substantially part of the principal transaction, and to be most material on the point now under consideration; it was a loan of Rs. 1,000, to meet one of the demands specified in the agreement, which may be presumed to have been peculiarly pressing, and the Rs. 1,000, are stipulated to be repaid on the 1st of *November*, in default of which the mortgage of a single village was to take effect. Their Lordships think there is every reason for presuming that the repayment was intended to be made out of the Rs. 19,000, to be advanced by the Appellant on his return to *Madura*; and if that be so, it is clear that his return was contemplated to take place on or before that day.

The next fact is that, on the 9th or 10th of *November*, the lease was executed to *Fondeclair*; and the remaining fact is the return of the Appellant on the 13th of *November*, as their Lordships understand the

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evidence; this would be nineteen days after the execution of the agreement.

There is a good deal of parol evidence to the effect, either that a period of eight days, or that the 1st of *November*, was agreed to specifically by the parties as the term beyond which the Respondent was not to be bound to wait for the Appellant's return; and their Lordships are disposed to give credit to the evidence: they do not think that the variation in regard to the eight days and the 1st of *November* makes the testimony unworthy of belief. But, it appears to them unnecessary to decide the case on this point; for they are clearly of opinion, looking at all the circumstances which appear on the face of the documents, the first of which discloses the nature of the debts due from the Respondent, which were mostly judgment debts, or debts on which the execution was pending, or for which warrants had issued; and the second that a portion of the money contracted for was advanced at once, and to be repaid on the 1st of *November*; that it was understood by both parties that a reasonable time for the Appellant's return would be within a few days, and that the delay of nineteen days was unreasonable. Such a delay would probably defeat the whole purpose of the loan; and there is not the slightest evidence that either by reason of distance, difficulty of conveyance, or the necessary or usual business of the circuit, a delay of nineteen days could have been considered probable.

On this ground their Lordships are prepared to recommend to Her Majesty that the appeal be dismissed: but as they do this on wholly different grounds from those relied on by the Court below, that the dismissal should be without costs.

MOHUN LALL SOOKUL and another - Appellants,
 AND
 BEBEE DOSS and others - - - - Respondents.*

*On petition from the Sudder Dewanny Adawlut,
 Calcutta.*

*Privy Council—Leave to appeal—Ex parte order granting—Finality of
 —Valuation of appeal—Mode of valuation of property.*

By *Ben. Reg. X.* of 1829, the test of the value of the property in suit is the selling, or market value.

An Order in Council made upon an *ex parte* application granting special leave to appeal upon an allegation as to the value of the property in dispute rescinded, there being omissions in the petition, of proceedings in the suit, which showed the true value of the property.

In ordinary circumstances, an Order in Council obtained upon an *ex parte* petition, which omitted to state the true facts, will be discharged with costs, but if there has been laches in applying to discharge the Order on the part of the Respondent, no costs will be given.

In this case special leave to appeal had been granted upon an *ex parte* application of the Appellants (a), upon an allegation as to the value of the subject matter in dispute in the suit.

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 1861.

A petition was now presented by the Respondents to rescind the Order in Council granting leave to appeal, alleging, that in the petition for leave to appeal, several important omissions had been made, namely, first that the answer of the Respondents to the plaint, whereby the question at issue, whether by *Ben. Reg. X.* of 1829, the value of the subject matter was to be computed according to the real or market value, had been omitted ;

* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. The Lord Justice Turner.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

(a) 7 Moore's Ind. App. Cases, 428.

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and, secondly, that a supplementary plaint filed by the Appellants, which stated that the suit had by mistake been valued at three times the *Sudder jumma* instead of Rs. 4,300, the real or market value of the property had also been omitted. The petition further alleged, that throughout the proceedings it was treated by the Appellants as a case regarding mortgaged premises, valued at Rs. 4,300 ; that the Respondents had applied to the *Sudder Dewanny Adawlut* at *Calcutta*, and to the Officiating Judge of *Chittagong*, to whom the enquiry had been by the Order in Council delegated, to give evidence of the value, but that such application had been refused by that Court, upon the ground that by the Order in Council, evidence of that fact was to be supplied by the Appellants, and the petition prayed, that the Order in Council granting leave to appeal might be rescinded, or that an Order might be made, directing an enquiry as to the real or market value of the property in dispute.

Mr. *W. Field*, for the Respondents, in support of the application, cited *Ben. Reg. X. of 1829*, schedule B, 8.

Mr. *Leith*, for the Appellants, opposed.

The Right Hon. Lord KINGSDOWN.

This is an application to discharge an Order in Council made by Her Majesty at the recommendation of their Lordships, on the 16th of *February*, 1860. By that Order liberty was given to the Appellants to appeal, notwithstanding that the property which was the subject of the suit, was of less value, as appeared upon the proceedings in the case, than Rs. 10,000, which is the sum limited by the Order in Council of the 13th of *June*, 1838.

A petition of this nature, being *ex parte*, it is a universal and a most important rule of this Court, that every fact which is material to the determination of the question raised upon the petition should be truly and fairly stated ; and where there is an omission of any material facts, whether it arises from improper intention on the part of the Petitioner, or whether it arises from accident or negligence, still the effect is just the same ; if this Court has been induced to make an Order, which if the facts were fully before it, it would not, or might not, have been induced to make.

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Now, in this case, their Lordships were of opinion, that in order to justify an appeal to this country it should be satisfactorily proved that the property in dispute really was of the value of Rs. 10,000. They did not think that there were any special circumstances in the case which would justify the Court in taking it out of the ordinary rule. There were no particular questions of law or indeed anything which would prevent the application of the strict general rule, which requires that the property in dispute should be of that value.

It was stated in the petition for leave to appeal, that the Plaintiffs had in the plaint represented the property to be of the value of Rs. 3,572, and that the suit was instituted to recover possession of certain mortgaged premises, of which the value was so estimated, but only for the purpose of complying with the rules of the East India Company's Courts for fixing the amount of the stamp upon the plaint ; and then, after stating the proceedings in the case, the petition concluded with assigning as a ground for making the application here, that the value of the property having been represented by the Plaintiff as

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Rs. 3,572, the Court below had no authority to grant an appeal. The petition also alleged that although it appeared from the statements in the plaint that the real or market value of the land in question in the suit must be taken to exceed the amount of Rs. 10,000, yet the amount laid in the plaint as the value of the suit for the purposes aforesaid, being only Rs. 3,572, three times the amount of one year's *jumma*, or rent, the Petitioners were prevented by the rules of the Court from applying to that Court for such leave.

The misrepresentation, therefore, upon that petition is this. The plaint, according to the Regulation, estimates the value of the property at three years' *jumma*. Three years' *jumma* amounts to Rs. 3,572, and, therefore, according to the Regulation, represented a value which would furnish no criterion of what the actual value was. In this state of things it appeared to their Lordships that the parties ought not to be concluded by such a statement ; that there was nothing inconsistent with that statement ; that the property might be of a greater value, and, therefore, their Lordships gave leave to appeal upon somewhat unusual terms, namely, referring it to the Court below to report what was the actual value of the property.

Ben. Reg. X. of 1829, cited before us, enacts, that in suits respecting revenue lands three years' amount of the *jumma* shall be taken to be the value of the property, and with respect to suits for houses, &c., and other things of value, the amount is to be computed according to the estimated selling price, and that every plaint shall specify the value of the thing claimed.

Now, it appears, that there were in this case two distinct modes of valuation, one of which affords no criterion whatever of the actual value, the other of which, if it were fairly stated, afforded a most certain

criterion, being the estimated selling price, not the price it sold for, but what the property would sell for at the time the plaint was filed.

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Now, it appears that the Plaintiff had represented by his plaint that the property was estimated at Rs. 3,572, which was three years' *jumma*. But this statement does not fall within the above Regulation. For the purposes of this suit it was necessary to state what the actual value was ; what the real selling value was ; what the value was according to the Regulation, and, upon the final supplemental plaint, it was stated that the property was valued for this purpose at Rs. 4,300, and in the record of the proceedings which had been drawn up, stating the issues which the parties were going to try, it was stated that afterwards the Plaintiff had filed a supplemental plaint, in which it was alleged that the suit had been valued at Rs. 4,300, the price or value of the land, and that as the stamp was Rs. 150, it was sufficient to cover a claim of Rs. 5,000. Is it possible not to understand this as applying to Regulation X. of 1829, and as stating therein the value, the estimated selling price? and which is stated at Rs. 4,300. Now, if that fact had been stated to their Lordships, it is hardly to be believed that the Order for leave to appeal granted by their Lordships would have been made.

If we were of opinion that this had been an intentional misrepresentation on the part of the then Petitioners, we should, without the least hesitation, not only have discharged the Order, but we should have made the party who applied for it pay all the costs, and have given no liberty whatever to make any further application.

Their Lordships are, however, inclined to take an indulgent view of the case. They are inclined to

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think that there was not any intentional misrepresentation ; and, therefore, though they discharge the Order for leave to appeal, they will not do it on the conditions I have mentioned. They would, indeed, under any circumstances, have thought it right, whether the mistake was intentional or unintentional, to have made the party applying for it pay all the costs, were it not for the delay on the other side. The Order for leave to appeal was made in *February*, 1860 ; it went out to *India*, and it appeared that at least in *August*, 1860, the Petitioners who now apply to discharge the Order were informed that they would have liberty to give evidence under it. We think they might have applied the moment they saw the petition and the Order which contained the directions I have mentioned ; for then they must have been aware that a very important fact had been kept back from the Court, and they might then have applied to have discharged the Order. Still they might have thought, that on the construction of the Order they should be enabled to give evidence, and they might have thought that it would be less expensive to make the application to the Court below. But, in *August*, 1860, they were told of the construction which the *Sudder Dewanny* Court at *Calcutta* had put upon their Lordships' Order, that they would not be at liberty to give evidence upon that enquiry ; and they were, therefore, then apprised of the manner in which the Order of their Lordships was to be carried out.

Under these circumstances, their Lordships are of opinion, that costs should not be awarded against the parties who obtained the Order giving leave to appeal, and they discharge such Order without costs and without prejudice to any other application by the Appellants, upon giving notice to the Respondents.

MAHARAJAH KOOWUR BABOO NI- }
 TRASUR SINGH - - - - - } *Appellant,*

AND

BABOO NUND LOLL SINGH, and others, - *Respondents.**

*On appeal from the Sudder Dewanny Adawlut at
 Calcutta.*

Res Judicata—Suit involving boundary dispute—Finding in—Conclusiveness of in subsequent suit for possession—Limitation—Suit for possession on basis of title and dispossession—Onus—Practice—New trial—Grounds for.

Decrees were made in the year 1816, in suits respecting disputed boundaries of certain *Mouzahs* in two *Zemindaries* and the boundary line determined. In 1845, a suit was brought by the representatives of one of the parties in the above suits to recover land alleged to be part of one of these *Mouzahs*, which land it was admitted by the Plaintiff that the Defendants had been in the possession of since the year 1834. It was pleaded in defence, first, that the land claimed, was within the boundary declared by the decrees of 1816 to belong to the Defendants; and, secondly, that the Plaintiff, or those under whom he claimed, had been out of possession for upwards of twelve years, and that the cause of action was consequently barred by *Ben. Reg. III.* of

THE Appellant, the *Zemindar* of *Pergunnah Nursingpore Koorah*, owned a village in his *Zemindary*, called *Mouzah Gopaulpore*, otherwise *Gopaulpore Maholee*.

17th, 20th, &
 22nd June,
 1860.

* Present: Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

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1793, sec. 16. In such circumstances it was held that the issue of possession was the first point to be considered, and that such issue was wholly independent of the question of boundary.

Held further, that as the Plaintiff sought to disturb the possession of the Defendants, admitted by him to have existed for eleven years, but which the Defendants alleged was a much longer period, the *onus probandi* was upon the Plaintiff to remove the bar to the action by *Ben. Reg. III.* of 1793, sec. 16, by satisfactory proof that the cause of action accrued to him on a dispossession, twelve years before the commencement of the suit, and that he, or some person through whom he claimed, was in possession during that period; and that no proof of anterior title in his favour, such as would be involved in the boundary question, could relieve him from this *onus*, or shift the *onus* on the Defendants, by compelling them to prove the time and manner of possession.

Although the evidence of witnesses for the Defendants as to possession is of no better character than those produced by the Plaintiff as to dispossession, yet it lies on the Plaintiff to make out his case, and as the probabilities of the case in this instance were against dispossession, it was held by the Judicial Committee, affirming the judgment of the *Sudder Dewanny Adawlut*, that the Plaintiff had failed to prove the dispossession of the Defendants, which was necessary to maintain the suit.

A preliminary objection was taken in the *Sudder Court* to a decree of the Principal *Sudder Ameen*, on the ground that the *Sudder Ameen* had omitted to draw up the issues in the suit as required by sec. 10 of *Ben. Reg. XXVI.* of 1814. This objection was held fatal, and the *Sudder Court* remitted the suit to the Lower Court with directions to lay down the issues in a regular way, and to try and determine the suit *de novo*. The Principal *Sudder Ameen* accordingly prepared the proper issues, and ordered that the parties should be called upon for their proofs. The Plaintiff did not go into fresh evidence, but prayed for judgment on the evidence already given, and upon the former evidence taken the Principal *Sudder Ameen* made a decree against the Plaintiff.

Held upon appeal by the Judicial Committee:—

First, that if this mode of trial was irregular, the Plaintiff had no just ground of complaint, as the irregularity was committed at his instance, or with his consent.

Second, that a suspicion, however probable in the mind of a Judge that a party who has failed to prove his case, might be more successful on a fuller investigation, does not constitute a sufficient ground for directing a new trial.

The Respondents were the proprietors of *Mouzah Rampore*, part of a *Zemindary*, called *Naredegur*.

The two *Mouzahs* adjoin each other, and disputes respecting the boundary line of the *Mouzahs* had arisen from a very early period between the ancestors of the Appellant and of the Respondents. The Appellant in the present appeal claimed 700 *beegahs* of land as being part of *Gopaulpore*; whilst the Respondents' case was, that the land in question was part of *Rampore*, and had been so declared by a decree of the

Court in the year 1816; and, further, that the land claimed had been in their possession and their ancestors' without any claim on the part of the Appellant, or under those through whom he claimed, since the year 1818.

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The facts of the case, which were complicated, were, in substance, as follows:—

The village of *Rampore*, together with certain other villages called *Rajpore*, *Cuddeah*, *Jyepore*, and *Jyepore Puckree*, were formerly the property of one *Mohun Singh*, the ancestor of the Respondents. In the year 1791, he was dispossessed of those villages by one *Deo Raj Singh* and obliged to bring a suit for their recovery, and that suit having ended in *Mohun Singh's* favour in 1803, he was again put in possession.

During *Deo Raj Singh's* possession, a dispute arose between him and *Madho Singh*, the Appellant's ancestor, who was the proprietor not only of the village of *Gopaulpore*, but of a village called *Surseeah*, in *Pergunnah Nursingpore Koorah*; touching the boundaries of *Surseeah* and of *Jyepore*, the adjoining village, claimed by *Deo Raj Singh*, and that dispute was referred to an *Ameen*, named *Khoda Yaar Khan*, to ascertain the boundaries, who, on the 24th of *August*, 1792, made an award to the effect, that the lands in dispute belonged to *Madho Singh*, and in that report he laid down the boundaries of the two *Pergunnahs* of *Naredegur* (in which *Mohun Singh's* villages were situate), and of *Nursingpore Koorah*, which included *Surseeah* and *Gopaulpore*. These boundaries were laid down principally with reference to a point, the position of which was ascertained, called *Baugh Jhujree*, due south of *Jyepore*, as appeared from a plan annexed to the award,

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and the substantial result was, that *Pergunnah Naredegur* (*Mohun Singh's* and the Respondents' property) lay to the north and west of that point, and *Nursingpore Koorah* to the south and east.

Notwithstanding this award, however, *Madho Singh* took advantage of the unsettled state of the title as between *Mohun Singh* and *Deo Raj Singh*, to lay claim to parts of the lands which were in dispute between them, and in 1803 and the following year he claimed or got possession of 411 *beegahs*, part of the village of *Jeypore Puckree*, and of 251 *beegahs*, parcel of *Rampore*, which *Madho Singh* alleged to be parcel of *Gopaulpore Maholee*.

In 1810, *Mohun Singh*, who, on the termination in his favour of the litigation with *Deo Raj Singh*, had obtained the right to the possession of his villages, instituted a suit against *Chuttur Singh*, the son of *Madho Singh*, he having died in the interim, to recover possession of both these parcels of land; but he was, on the 27th of *January*, 1814, nonsuited, not upon the merits, but upon the technical objection that he had included in one suit lands in two separate villages. He thereupon, on the 15th of *November*, 1814, instituted a fresh suit to recover the 251 *beegahs*, parcel of *Rampore*, and, on the 11th of *May*, 1816, obtained a decree in his favour, which was upheld on appeal by the *Sudder Court*, on the 8th of *December*, 1818.

In this suit *Mohun Singh* and *Chuttur Singh* filed plans. By these plans, it appeared that the 251 *beegahs* then in dispute lay to the west of *Baugh Jhujree*, and to the north of a point in a stream called *Nudder Purwanna*.

Shortly after the institution of the above suit by *Mohun Singh* for the recovery of the 251 *beegahs*,

Chutter Singh, in *January*, 1815, brought a cross suit in the *Zillah Court of Tirhoot* against *Mohun Singh* to recover 400 *beegahs* of land, alleged by him to be parcel of *Gopaulpore*. The 400 *beegahs* were, however, held by that Court to belong to *Rampore*, and this decision was confirmed on appeal by the *Patna Court of appeal*, on the 8th of *December*, 1818.

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On the 5th of *January*, 1818, *Mohun Singh* was put into possession of the disputed lands; and he shortly afterwards brought them into cultivation by his villagers from *Rampore*, and it appeared that he and his descendants since that time, and until the institution of the suit, out of which the present appeal arose, had, with one exception, in 1834, when another attempt was made to encroach upon *Rampore*, held undisputed possession.

The *Mouzah Maholee* appears to have become the property of the wives of one *Tej Narain Singh*; and, on their obtaining a decree in their favour as to that village, they laid an attachment upon 200 *beegahs*, part of *Rampore*. The then *Zemindar*, *Chintamun Singh*, the son of *Mohun Singh*, instituted proceedings in the Criminal Court of *Zillah Tirhoot* under *Ben. Reg. XV. of 1824*, to preserve his possession to those *beegahs*, decreed to him as being part of *Rampore*; and the Magistrate having examined the decree of 1816, and compared the boundaries, found that the 200 *beegahs* were part of those included in the suit brought by *Mohun Singh* for 251 *beegahs*, and by an order made on the 24th of *May*, 1834, maintained *Chintamun Singh's* possession.

On the 5th of *August*, 1845, *Roodur Singh*, the then proprietor of *Nursingpore Koorah*, instituted

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the present suit in the *Zillah* Court of *Bhagulpore* against *Chintamun Singh* and the Respondents, for possession and mesne profits, claiming the lands which were the subject of the suit of 1814. He, however, denied their identity, and alleged by his plaint, that possession was forcibly acquired by *Chintamun Singh* after the proceedings in 1834. In order to account for the delay since that time, he set up certain conversations and admissions, which he alleged were made by the Respondents, that they agreed to restore the land to him; and, in order to destroy the identity of the lands, he misplaced the old *bandh* and the old tank of *Gopaulpore* (substituting *Bodhee Singh's* tank for it), and thus drew a boundary considerably to the north and west so as to exclude the lands from *Rampore*.

The Defendants in their answer denied these allegations, and insisted that the Plaintiff's claim was barred by the provisions of *Ben. Reg. III.* of 1793, secs. 12 & 16, as the Plaintiff sought to recover the possession of land pertaining to their *Zemindary* mentioned in both the decrees of the 11th of *May*, 1816, and the 8th of *December*, 1818, which decrees, as they admitted in their answer, had laid down the boundaries of *Mouzah Rampore*, and of *Mouzah Gopaulpore*, agreeably to the award of *Khoda Yaar Khan*.

A replication and rejoinder having been filed, an order was made on the 5th of *May*, 1847, that *Sheeb Loll*, the Record Keeper of the Court, should proceed to the spot and draw a plan; and he accordingly, on the 9th of *June*, 1847, made his report, filing with it a plan, which contained the assertions of both sides, as to the position of the different

points bearing or supposed to bear upon the point at issue. Besides this plan, plans of the villages of *Rampore* and *Gopaulpore* were also filed. The Plaintiff also filed a plan, containing his allegations as to the boundary, and copies of the two plans filed in the suit of 1814, were also given in evidence. Witnesses were examined upon the question of possession by the Respondents. Their evidence was of a conflicting character, the effect of which is mentioned in their Lordships' judgment.

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On the 28th of *December*, 1849, the Principal *Sudder Ameen*, without laying down issues, as required by sec. 10, of *Ben. Reg. XXVI.* of 1814, gave judgment in the Plaintiff's favour.

The Defendants appealed from this decree to the *Sudder Dewanny Court* at *Calcutta*. Upon the appeal coming on for hearing, a preliminary objection was raised on their behalf that the Court below had not, according to the Law of procedure, drawn up and recorded any issues. The *Sudder Court* held that this objection was fatal, and ordered that the decree appealed from should be set aside, and the case remanded to the Principal *Sudder Ameen*, with directions to lay down the issues and call upon the parties for proofs and refutations, and then to try the case *de novo*.

In accordance with the order of the *Sudder Court*, a proceeding took place before the *Zillah Court*, on the 4th of *December*, 1852, when the Principal *Sudder Ameen* recorded the issues as follows:—First, were the lands at issue within the boundaries of *Mouzah Rampore*, the property of the Defendants, as laid down by the decree of Court, dated 11th of *May*,

1860. 1816, agreeably to the *kyfrut* of *Khoda Yaar Khan*,
 MAHARAJAH or apart from them? Secondly, was the Plaintiff's
 KOOWUR suit within the period limited for the cognizance of
 BABOO the Court, or not?
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2. No evidence was gone into upon these issues, the
 BAROO Plaintiff having declined to do so, and asking for
 NUND judgment on the evidence already filed, and, on the
 LOLL SINGH. 13th of *December*, 1852, the Principal *Sudder Ameen*
 gave judgment to the same effect as the former one.
 The Defendants appealed from this judgment to the
Sudder Dewanny Adawlut at *Calcutta*.

The hearing of the appeal took place before Messrs.
Sconce, *Trevor*, and *Torrens*, three of the Judges of
 the *Sudder Dewanny Adawlut*. The Judges differed
 in opinion, Messrs. *Sconce* and *Trevor* agreeing to
 reverse the decree of the Principal *Sudder Ameen*.
 The remaining Judge, Mr. *Torrens*, was opposed to
 that course, being of opinion that the Court should
 remand the case for re-trial by the Principal *Sudder*
Ameen.

The judgment and decree pronounced by Messrs.
Sconce and *Trevor*, forming the majority of the Judges,
 was as follows:—"We might take objection to the
 form in which the Principal *Sudder Ameen*'s decree has
 been passed, for in his latest decision, he has con-
 fined himself to such points as the remand in-
 volved, and, upon the merits, has adopted in gene-
 ral terms, without repeating details, the decree of
December, 1849. The last and final decree should
 have been complete in itself, and should not have
 been made to rest on a decision which has been set
 aside; but, as the grounds of the latest judgment
 taken in connection with the first have been suffi-

ciently intelligible to the litigants, and are so to the majority of this Court, we think it inexpedient again, upon this point of form, to re-transfer the case to the Lower Court. For the better understanding of the issue submitted to us, we have fully heard the parties, both as regards the line of boundary, which, by the decree of 1816, should determine the extent of their villages, *Gopaulpore* and *Rampore*, and as regards the enjoyment by the Plaintiff of the disputed land within a period which renders this suit admissible. That the several parties have had every opportunity before the Lower Court to present their case complete, is not denied by them; nor before ourselves have they indicated, if it were optional to them to indicate, any other sources of available evidence than that already adduced. And thus we cannot hesitate to adjudicate upon the proceedings as they came before us. The Principal *Sudder Ameen* has remarked, shortly, that Plaintiff's witnesses prove that he was in possession of the disputed land before 1242, F. S.; and connecting the presumed dispossession of that year with the boundary laid down nineteen years before, he found Plaintiff's claim to be established. But, it appears to us, that the evidence of the Plaintiff is wholly inadequate to sustain the specific allegations, or to justify the large claim which he has preferred. Plaintiff's witnesses say, generally, that he was dispossessed in 1242, F. S., but we require more detailed information to prevent the act of forcible dispossession characterized by the circumstances with which it must have been attended. Seven hundred *beegahs*—nearly all, as is said by the Plaintiff's witnesses, under cultivation—could not have been transferred from his occupancy without the occurrence of some

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event sufficiently conspicuous to be presented to us in evidence; nor is it to be presumed that his long asserted enjoyment of his *Ryots'* rents, previous to 1242, F.S., could become suddenly interrupted, without some attempt on his part to enforce, with the aid of summary laws, the payment of rent for 1242, F. S., which, up to 1241, F. S., he had collected. Nor, further, is it intelligible to us that Plaintiff (Respondent), without an application to the Magistrate, should have suffered the order passed by that Officer, under Reg. XV. of 1824, to have been executed to his prejudice, had he not been a party to the summary proceeding in which it was issued. We think that, at all events, throughout some portion of the line, the Principal *Sudder Ameen's* endeavour to trace the boundary decreed in 1816 A.D. has not been unsuccessful; but in this suit we cannot *per saltum* pass from 1242 to 1223 (1816), as if to find in that year the link of Plaintiff's right, from which he subsequently became dissevered. What we have said of the evidence of dispossession in 1242, F. S., is equally applicable to the evidence for possession in 1241 *Fuslee*, or any previous year. We have, in fact, no specific evidence that the Plaintiff (Respondent) exercised the rights of proprietor between 1223, *Fuslee* (1816) and 1242: it is not, for example, shown what rents he realized from the 700 *beegahs*, and yet the realization of rent is the strongest evidence of possession. If we were to grant that in the decree of 1816 A.D., to a greater or less extent, an inceptive right is traceable, we have no evidence of the effect given to the decree, and, as already intimated, none to establish the enjoyment of an appropriated right between 1816 (1223) and the asserted date of dispossession in 1835 (1242).

It is, therefore, ordered, that the decree of the Principal *Sudder Ameen* be reversed, and the suit dismissed with costs: that the Appellant recover from the Plaintiff (Respondent), the costs of this Court, with interest, to the day of realization, agreeably to the account prepared by the Accountant of costs of this Court; and that, in order to realize the expenses of the *Zillah* Court, they present a petition in the *Zillah* whence a proper order will be passed, in accordance with the purport of the Circular Order, dated 4th *March*, 1836.”

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The third Judge, Mr. *Torrens*, recorded his opinion as follows:—“In a case circumstanced as the present, both as to the character of the claim, and the mode in which the proceedings of the Lower Court were conducted, I am unable to agree with my colleagues in the reversal of the decree passed, simply on the ground of the record, as now before us, not containing fuller proofs of the alleged act of dispossession. The latter part of the issue, which the pleaders of both parties, certainly with the permission of this Court, have agreed to, cannot, it appears to me, be satisfactorily tried without first considering whether the map prepared by the orders of the Lower Court shows, as stated in the decision, the true boundary between the two villages, as determined in the suit between the fathers of the litigant parties in 1816. If it be as the Lower Court has now decided, it was surely for the Appellants in some way to show how, in direct opposition to a former judgment, they had passed the line of boundary and acquired possession of land held on such strong title against them as a final decree of Court. The principal *Sudder Ameen*’s decision may in effect be wrong or not; but it has been based, I

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consider, purely on comparison of the map, which he had prepared by his *Amlah* with the boundaries as laid down in the decree of 1816 A.D. He has taken two fixed points indicated in the map as those betwixt which a line running in a northern and southern direction was drawn under the decision of that year, which line fixed the boundary of the Plaintiff's, (Respondent's,) village of *Gopaulpore*, and the Appellants' village of *Rampore*. The Appellants assent to one of these points, the most southern, as the true point—contending that the map, as laid down, has shifted the northern point from its real position. To show this, they refer to copies of former maps filed or agreed to by the Respondent, and to the relative position as there given, and as now existing in the *Mofussil*, of certain known landmarks and village boundaries, bearing on the disputed site of the northern point fixed in 1816 A.D. The investigations of the Principal *Sudder Ameen* have been mainly directed to these obligations; and having concluded that the map prepared by his *Amlah* set them aside, and that it had defined the true boundary as laid down in 1816 A.D., without ever holding any proceedings, as imperatively required by law, under sec. 10, Reg. XXVI., 1814, he first determines the case chiefly on this conclusion, but also on oral evidence of dispossession. On an appeal, the *Sudder* Court, seeing the illegality of the decision without the proceedings referred to, remanded the case. On the 4th of *December*, 1852, the Principal *Sudder Ameen* went through what he considered the form of proceeding, and on the 13th, decided that the points then settled for adjudication had already been proved and disposed of by his first decision; and so, without indicating

the necessity of any further proof, and without the Defendants having preferred any further objection than that the deputation of an unsworn *Amlah* to make a map was opposed to rule, he decided the case merely by reference to his former judgment. This mode of proceeding entirely defeats the object of clauses 3 and 4, sec. 10, Reg. XXVI., 1814, and the Plaintiff (Respondent) has thus necessarily rested throughout on the Lower Court's view of the map and boundary, and has not been, as I think, ever in a position to bring forward more substantial proof on the point of dispossession. That which he had given on this point in the informal trial, the oral evidence of a few ignorant *Ryots*, is quite as good as any evidence given by the Defendants as to their ever having remained in undisturbed occupancy of the lands. Neither party, in fact, from having directed their chief attention to the principal *Sudder Ameen's* investigation and judgment on the boundaries, have adduced the best evidence which might be procured on the questions of possession and dispossession; and it is to be observed in this country, before the recent revenue survey, where disputes exist respecting tracts of land on the confines of two contiguous *Zemindaries*, which tracts, as in this instance, are not shown to be held by resident *Ryots*, the *Ryots* of one *Zemindar* cultivate one part of the disputed land one year, and those of the other *Zemindar* another part of the next year, so that there is no very defined possession until some act occurs on the part of either which drives the other into Court; and, I, therefore, think, in this case, without authentic collection papers produced, or without the evidence of more respectable witnesses, that even on the question of dispossession, the boun-

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dary line, if the principal *Sudder Ameen's* decision on it be correct, is our most certain guide. Be that as it may, I conceive that his irregular proceedings, as before noticed, gave no opportunity for Plaintiff's bringing fuller proof as to the act of dispossession; and I certainly would say, with much deference to my colleagues, that without determining the correctness or otherwise of the map and boundary line as compared with the former decision, the Court is in no position to set aside the decree on the grounds assigned. The petition of plaint does not appear to me to imply simply one single act of dispossession; it states that the Defendants had first, on plea of a decision passed in their favour in a case under Reg. XV. of 1824, with other parties, contrived to obtain possession of 200 *beegahs* within the old boundary in 1242, F.S., and then, working on this, encroached on, or took possession of, the whole 700 *beegahs* now claimed. The Plaintiff, finding they had done so, sent for them, and called on them to retire from beyond the boundary; and on their persisting in not doing so, at length brought his present action, so as to be within the period of limitation. In the first decision of the Principal *Sudder Ameen*, he states that the map of his *Amlah*, on which he has adjudicated the case, is supported by the Revenue survey map, prepared whilst the case was pending; and, under all circumstances, instead of finally reversing the order passed, I would return the case to the Principal *Sudder Ameen* for re-trial, after having an intelligible map prepared, such as prescribed by the Circular Order of this Court, No. 173, of the 5th of *May*, 1852, A.D., which would show distinctly the relative positions and distances of the points by which the

boundary line of 1816 was laid down: and on the question of possession or dispossession, I would require that further and more substantial evidence should be taken, by enforcing the provision of Act, No. 19 of 1853. Such a course, I think, would be most equitable, and most likely to put an end to litigation, which, to judge from some of the statements made, would appear to have been going on respecting the same boundary, in greater or less degree, ever since 1199, B.S., notwithstanding numerous decisions passed."

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The present appeal was brought from the decree of the majority of the Court.

The appeal was argued by

Mr. *R. Palmer*, Q. C., and Mr. *Leith*, for the Appellant, and

Mr. *Forsyth*, Q. C., and Mr. *W. Field*, for the Respondents.

The material arguments are stated and referred to in their Lordships' judgment, which was delivered by
The Lord Justice TURNER.

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The parties to this cause are the proprietors of two contiguous *Zemindaries* in *Zillah Bhagulpore*. For many years the *Zemindary* called *Pergunnah Nursingpore Koorah*, which includes the village called *Mouzah Gopaulpore*, has been held by the Appellant, or his ancestors; whilst the family of the Respondents has been in the possession of the *Zemindary* called *Naredegur*, which includes the village called *Mouzah Rampoor*.

That litigation concerning the boundaries of the two estates has been frequent, if not incessant.

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In the year 1792, there was a suit to settle the disputed boundaries of *Mouzah Surseeah*, part of the Appellant's *Zemindary*, *Nursingpore Koorah*, and *Mouzah Jyepore Puckree*, part of the *Zemindary* of *Naredegur*. This was determined in accordance with the award of an *Ameen*, appointed with the consent of both parties, named *Khoda Yaar Khan*, which fixed, or ought to have fixed, the boundaries between the two *Mouzahs*, and so far, those between the two *Zemindaries*. It may be proper to mention, though the circumstance is not now material, that this suit was between an ancestor of the Appellant and one *Deo Raj Singh*, who appears to have dispossessed at that time the Respondents' ancestor of *Naredegur*.

In 1816, two suits were pending between *Mohun Singh*, the grandfather of the Respondents, and *Maharajah Chuttur Singh*, the grandfather of the Appellant. In one of them *Mohun Singh*, as Plaintiff, claimed as part of *Mouzah Rampoor*, two hundred and fifty-one *beegahs* of land, which the *Maharajah*, as Defendant, insisted formed part of *Mouzah Gopaulpore*. In the other, the *Maharajah*, as Plaintiff, claimed as part of *Mouzah Gopaulpore*, four hundred *beegahs* of land, lying to the north and west of the lands in question in the other suit, and *Mohun Singh*, as Defendant, insisted that they were comprised in *Mouzah Rampoor*. In the first suit the *Zillah Judge*, proceeding in part upon the old award of *Khoda Yaar Khan*, of which both parties admitted the accuracy, drew a boundary line between the two *Mouzahs*, and gave to the Plaintiff so much of the land claimed as fell within *Mouzah Rampoor* thus defined. The suit of *Chuttur Singh* he simply dismissed, inasmuch as the whole of the four hundred *beegahs*

claimed by him were clearly within *Mouzah Rampoor* as defined by the other decree. Both decrees were, on the appeal of *Maharajah Chuttur Singh*, confirmed in 1818, by the then Court of appeal at *Patna*.

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In 1834, there was a summary proceeding in the Criminal Court under Regulation XV. of 1824, touching the possession of two hundred *beegahs* of land which were claimed on the one side by the then proprietors of *Naredegur* as part of *Mouzah Rampoor*, and on the other by two widows who had acquired an interest in *Mouzah Maholee*, a village forming part of *Nursingpore Poorah*, and either identical with or contiguous to *Mouzah Gopaulpore*, which, in these proceedings, is sometimes called *Gopaulpore Maholee*. The decision of the Magistrate was to the effect, that the proprietors of *Naredegur* were in possession of the lands in question, and ought to be maintained in it. To this proceeding, which bears date the 24th of *May*, 1834, no person whom the Appellant represents was directly a party. He has, however, produced it for a particular purpose, and made it part of his case. It is unnecessary, at least for the present, to go more fully into those earlier proceedings, because, if material at all, they can only be material as evidence upon one or other of the issues raised in the present suit.

This suit was instituted in *August*, 1845, by the father of the present Appellant. It was for the recovery of seven hundred *beegahs* of land, alleged to have been part of *Mouzah Gopaulpore*, but admitted to have been in the possession of the Respondents, though by wrongful title, since *May*, 1834, or for a period commencing soon after that date. The case made by the Plaintiff on his pleadings was shortly this:—

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That the seven hundred *beegahs* in question were within *Mouzah Gopaulpore* as defined by the decree of 1816; that the Defendants had taken possession of them, under colour of the award of the 24th of May, 1834, some time in the year 1835, and had ever since continued in possession; but that during these ten years, and in order to prevent the institution of a suit against them, they had repeatedly admitted the Plaintiff's title, and promised to restore the land.

The Defendants' case, on their pleadings, was to this effect:—That the seven hundred *beegahs* claimed were within the boundary of *Mouzah Rampoor* as defined by the decree of 1816; that they were, in fact, the aggregate of the two hundred and fifty-one *beegahs* and four hundred *beegahs*, which were the subject of the two suits finally determined by the confirmation of that decree in 1818; that the title to them was, therefore, *res judicata*; and further, that in any case, the Plaintiff and his father had been out of possession of them for upwards of twelve years next before the institution of the suit, which was, therefore, barred by the Regulation of Limitation.

On the statements, therefore, of the two parties, it appears that the substantial questions of fact in dispute between them were:—

First. What was the boundary-line laid down by the decree of 1816, to which both appealed?

Second. Was the Plaintiff, or his father, *Chuttur Singh*, in possession of the lands claimed at any time within the period of twelve years next before the institution of the suit?

The words of the decree of 1816 are: "It is, therefore, ordered, that from the edge of the old

bandh eastward, which is in the map of the Plaintiff, and from the old *pokhur*, which is in the map of the Defendant, and all along to *Lullahee Ghaut* southward, which is in the map of the Plaintiff, and which the Defendant states to be *Ghaut Suspatee*, the boundary is fixed of *Mouzah Rampoor*, the *Milkeut* of the Plaintiff, from *Mouzah Gopaulpore Maholee*, the property of the Defendant."

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The parties to the present suit were agreed as to the position of *Ghaut Suspatee*, or *Lullahee*, but differed materially as to the position of the two other points. It might well be supposed that this contention could be settled by the production of the two maps referred to in the decree. Unfortunately, the Appellant impugns the genuineness of the map which is put in by the Respondents, as that produced by *Mohun Singh*, the Plaintiff in 1816; and on the map put in by the Appellant as the map produced by *Chuttur Singh*, the Defendant in 1816, there appear to be several *Pokhurs* or tanks and an oval mark which, though it contains no description but the words "*Peepul tree*," the Appellant now contends, denoted the old *Pokhur* referred to in the decree. Hence the common appeal to the decree of 1816 does nothing more than settle one of the termini of the boundary line, and resolve the general issue of the boundary line into the two particular issues, where was the old *bandh*? and, where the old *Pokhur*?

The Principal *Sudder Ameen*, before whom this suit was pending, took the evidence which each side tendered, touching either the possession of the disputed land or the boundary question. He also, by a proceeding, dated the 5th of *May*, 1847, directed one

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Lallah Sheeb Lall, the Record Keeper of his Court, to visit the spot and make a plan of the disputed land in the presence of both parties. To the character and mode of proceeding of the *Lallah* objection is no longer taken. He visited the spot and made a map or plan, and a report. Upon these materials and the evidence taken previously, the Principal *Sudder Ameen* made his first decree in favour of the Appellant. It is dated the 28th of *December*, 1848. From that decree the Respondents appealed to the *Sudder Dewanny Adawlut*. In the appellate Court a preliminary objection was taken to the decree on the ground that the Principal *Sudder Ameen* had omitted to draw up the issues in the suit in conformity with cl. 3, sec. 10, of Regulation XXVI. of 1814 ; and the Court saw fit to remand the cause to the Judge below, with a direction to lay down the issues in the regular way, and “having called upon both parties for proofs and refutations of those issues, to try and determine the cause *de novo*.” The cause went back ; and the Judge laid down the issues, which were, substantially,—Whether the lands in question were within the boundaries of *Mouzah Rampoor*, as defined by the decree of 1816, and whether the Plaintiff’s suit was within the period of limitation or not. By the same proceeding, which was dated the 4th of *December*, 1852, he ordered that the parties should be called upon for their proofs. The Appellant took no advantage of the opportunity thus afforded to him of giving fresh evidence ; but, by petition, prayed for judgment on the evidence, oral and documentary, already given. The Respondents only filed certain judgments of the *Sudder Dewanny Adawlut*, given in other cases, for

the purpose of showing the invalidity of *Lallah Sheeb Lall's* investigation and report,—a point now given up. The Principal *Sudder Ameen*, therefore, made upon the old evidence a second decree in favour of the Plaintiff in the suit. Against it the present Respondents renewed their appeal to the *Sudder Dewanny Adawlut*.

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The appellate Court was divided, not so much on the merits of this case as upon the proper method of determining them. Two of the Judges, without entering into the boundary question, or impugning the decision of the Court below on that point, were for reversing the decree, and dismissing the suit on the ground that the Plaintiff had failed to prove his possession of the disputed lands at any time between 1816 and the commencement of the suit, or his alleged dispossession of them at any time in or after *May*, 1834. The dissentient Judge did not go the length of saying that the decree below ought to be affirmed. He seems to have thought that the finding of the Court as to the boundary line might shift the burden of proof as to the time and manner of dispossession on the Defendants; that on both issues there had been a mis-trial, and that it was proper to remand the case for another trial after the preparation of a more intelligible map, and taking further and better evidence on the question of possession, particularly that of the parties under the provisions of Act, No. XIX. of 1853. The opinion of the majority of course prevailed, the decree of the Court below was reversed, and the Appellant's suit dismissed. Against that decree of the *Sudder Court*, the present appeal has been preferred.

The learned Counsel for the Appellant have not

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strongly contended that the proper order to be made on this appeal, is one remitting the case for re-trial in the manner suggested by Mr. *Torrens* in the *Sudder* Court. They have rather insisted that on the materials now before their Lordships, he is entitled to have the decree made in his favour by the Principal *Sudder Ameen*, affirmed. Their Lordships, however, desire to observe that in their judgment the majority of the *Sudder* Court was right in treating the cause as ripe for final decision. The Appellant had had, at all events from the date of the settlement of the issues, clear notice of what he had to prove. He had been called upon to adduce further evidence on those issues if he had any to give. He advisedly declined to do so, and called for the judgment of the Court upon the evidence already given. If this manner of trial were irregular, it is not for him to complain of an irregularity committed at his instance, or with his consent. And the suspicion, however probable, of the Judge, that a party who has failed to prove his case, may be more successful on a second and fuller investigation, is no sufficient ground for directing a new trial.

Again, their Lordships concur with the majority of the *Sudder* Court in thinking that the issue of possession is the first to be considered in this case, and that it is wholly independent of the boundary question. The Appellant is seeking to disturb the possession, admitted to have existed for about eleven years, of Defendants, who insist on a possession of much longer duration as a statutory bar to the suit. It clearly lies on him to remove that bar by satisfactory proof that the cause of action accrued to him (for that is the way in which the Regulation puts it)

on a dispossession within twelve years next before the commencement of the suit ; and, therefore, that he, or some person through whom he claims, was in possession during that period. No proof of anterior title, such as would be involved in the decision of the boundary question in his favour, can relieve him from this burden, or shift it upon his adversaries by compelling them to prove the time and manner of dispossession. The lands in question may have been part of *Mouzah Gopaulpore*, and as such may have been enjoyed by his ancestor, and yet he may have lost, by lapse of time, his right to recover them. Their Lordships, therefore, propose to consider in the first place, what evidence there is that the Appellant, or any person through whom he claims, was in possession of the lands in question at any time within twelve years next before the commencement of the suit.

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There are eight witnesses examined on the part of the Appellant. They all agree in stating that his grandfather, *Chuttur Singh*, was in possession of the lands in question until some time in the *Fuslee* year 1242, corresponding with 1835, A.D., and was dispossessed under colour of the Magistrate's order of *May*, 1834. All of them, with the exception of the second, *Baboo Ram Mundur*, speak of this dispossession as "forcible ;" as effected with more or less of violence, and in the face of opposition on the part of the occupiers of the land. They do not agree as to the fact whether or no a *Peon* from the Magistrate's Court was present to give effect to the order of *May*, 1834. They are pretty well agreed that the disputed land was, before the alleged dispossession, for the most part under

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cultivation ; that the cultivated portion of it was rented at from Rs. 2 to Rs. 2. 6 a. *per beegah*, and yielded from Rs. 1,100, to 1,300, per annum. Some of them give the names of the cultivators ; some, but not all, speak as if the whole land had been farmed by one *Tajaen*, who, in such case, would have paid a gross rent to the *Zemindar*, and have made the collections from the *Ryots* on his own account. No such person was produced as a witness ; nor is the oral testimony supported by the production of any paper purporting to be lease, *Pottah*, *Kaboolyat*, or receipt for rent,—the usual adminicula of proof in such cases. Again, most of the witnesses concur in saying that, before the alleged dispossession, there was but one hamlet on the disputed lands, the inhabitants of which deserted it upon the dispossession ; and that the Defendants had, year by year, since 1835, established three or four new hamlets upon them.

The Appellant's witnesses are contradicted by some nine or ten on the part of the Respondents. The general scope of this latter testimony is to show that the disputed lands are within the boundary of *Rampoor* as defined by the decree of 1816, and have ever since that date been in the possession of the Respondents' family ; that they are identical with the 400 and 251 *beegahs* which were the subjects of the two suits of 1816 ; that the 251 *beegahs*, or part of them, were also the subject of the dispute with the widows of *Tej Narain Singh*, which was settled by the order of *May*, 1834 ; and that there are three hamlets on the lands in question in the suit, of which the latest in date had, in 1847, been established for

upwards of twenty years. This testimony is also unsupported by documents: but the last of the witnesses seems to be somewhat more respectable in point of station than the Appellant's witnesses. Let it be granted, however, that the oral evidence on the part of the Respondents is no better than that on the part of the Appellant; it must still lie on the Appellant to make out his case; and their Lordships have next to consider whether he has done so, by the greater probability of the tale told by his witnesses.

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Their Lordships are of opinion, that the balance of probabilities is decidedly against him. His witnesses agree that the land was for the most part under cultivation, and yielded a considerable revenue. They treat the dispossession as a single and forcible act. These admissions exclude the hypothesis, which was sometimes suggested in the course of the argument, that the Respondents' possession may have been gradually acquired by squatting on waste land. Again, the theory is, that possession was gained under colour of the order of *May*, 1834. The 200 *beegahs* which were the subject of that order, are either included in the 700 *beegahs* now in dispute, or are distinct from them. On the latter assumption it is not easy to see (and this difficulty is wholly unexplained) how an order maintaining one man in the possession of certain lands can be made an instrument for turning another man out of the possession of other lands. The former assumption implies that 700 *beegahs* were taken under an award for only 200 *beegahs*; that the proceeding before the Magistrate, who had only jurisdiction to determine the fact of possession, was had

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between two parties, neither of whom was really in possession ; and that he, in whose favour the order was made, successfully used it to eject the actual possessor of the lands, who being no party to the proceeding, was not bound by it. Such doings may not be without example in India ; but those aggrieved by them do not ordinarily acquiesce in them. Lastly, in any view of the evidence there was a palpable, if not violent, invasion of *Chuttur Singh's* possession, known to him at the time. Is it conceivable that one so prone to litigation as he is shown to have been, would not immediately have sought redress, either by a summary proceeding under Reg. XV. of 1824, or by regular suit? To account for his unnatural acquiescence, the Appellant and his witnesses have recourse to a very common subterfuge of falsehood. They say that the Respondents admitted their adversary's title, and promised to restore the lands. The plaint alleges that there were repeated assurances of this kind. The witnesses only depose to one *ante litem motam*; but add that ten years afterwards, when the suit had been commenced by *Chuttur Singh's* son, the Respondents again offered to relinquish the lands on being released from the claim for mesne profits. Their Lordships consider this part of the Appellant's case simply incredible. And, on the whole evidence, they are of opinion, that he has failed to give that proof of the alleged possession of *Chuttur Singh* which is essential to the maintenance of this suit.

This being so, it is unnecessary to go into the boundary question. Upon that, although sensible of the force of Mr. *Palmer's* observation that questions of that kind are presumably best determined by

local Judges, their Lordships are by no means satisfied that the Principal *Sudder Ameen* has come to a correct conclusion, or that the lands in question are within the limits of *Mouzah Gopaulpore* as defined by the decree of 1816. But they do not decide this question. Their decision of the other question is of itself sufficient ground for the recommendation, which they propose to make to Her Majesty, that this appeal be dismissed with costs.

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THE GOVERNMENT OF BENGAL - - - Appellant,
AND

MUSSUMAT SHURRUFFUTOONNISSA
(after her death, SAYYUD SHAH AS-
SAD OOLAH, her son and heir), and
SAYYUD SHAH ENAYET HOSSEIN - - } Respondents.*

On appeal from the Sudder Dewanny Adawlut at Calcutta.

Bengal Limitation Regulation (II of 1805), S. 2, cl. (2)—Construction—“Public right”—Recovery of costs of Government in suit, if constitutes—Limitation—Exemption from—Sufficient cause.

Under the provisions of the Statute, 3rd & 4th Will. IV., c. 41, and the Order in Council of the 4th September, 1833, an appeal from the *Sudder Court in India* was brought to a hearing by the East India Company, before the Judicial Committee of the Privy Council, and, by an Order in Council made on the appeal in 1836, the costs incurred in prosecuting the

THIS appeal arose under the following circumstances:—

25th June
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Some time previously to the year 1833, an appeal was preferred to His late Majesty in Council, by *Shah Assud Oolah*, the father of *Sayyud Shah Enayet*

* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

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appeal were directed to be paid to the East India Company by the respective parties to the appeal, or their representatives, as provided by the Order in Council of the 18th of *November*, 1833. On a suit brought by the Government in 1852, against the representatives of one of the parties to the appeal, to recover part of the costs incurred by the East India Company in bringing the appeal to a hearing. Held:—

First, that the recovery of the costs incurred by the East India Company, being in the character of agents to prosecute the dormant appeal, under the Statute, 3rd & 4th *Will.* IV., c. 41, sec. 22, and Order in Council of the 4th *September*, 1833, did not constitute a “public right” within the provisions of cl. 2, sec. 2, of *Ben. Reg.* II. of 1805, which gives the Government a period of sixty years for bringing a suit; and,

Secondly, that the claim was barred by sec. 14 of *Ben. Reg.* III. of 1793, and the Court in *India* prohibited from entertaining the suit, as it had not been brought within twelve years, the time limited by that Regulation.

The Respondents appeared by Counsel at the hearing to argue the appeal, without having lodged a printed case. Their Lordships refused to hear the appeal, until a printed case was lodged.

Hossein, one of the present Respondents, against *Mussumat Emamun*, as Respondent, from a decision of the *Sudder Dewanny Adawlut* in *Bengal*.

Under the provisions of Statute, 3rd & 4th *Will.* IV., c. 41, sec. 22, and the Order in Council of the 4th *September*, 1833, that appeal was brought to a hearing by the East India Company, before the Judicial Committee of the Privy Council; and on the 7th of *December*, 1836, the Judicial Committee reported to His late Majesty, that the decree of the *Sudder Dewanny Adawlut* should be affirmed; and their Lordships directed that there should be paid to the East India Company, or their agent, by the Appellant and Respondent respectively, or their respective representative or representatives, certain sums for costs of bringing the appeal to a hearing. This report of the Judicial Committee was confirmed by an Order in Council, dated the 22nd of *December*, 1836.

Previously to the decision upon the above appeal, *Shah Assud Oollah* died, leaving *Sayyud Shah Enayet Hossein* his only son and heir, who succeeded to his father's estate.

Early in the year 1837, the Government of Bengal proceeded to adopt measures for the realization of the sum of Rs. 31,019. 0a. 12p., the amount of the costs due to the East India Company under the Order in Council founded upon the decision of the Judicial Committee; and, upon the application of the Government, orders were issued by the Judges of *Zillah Bhagulpoor* for the sale of certain *Mouzahs* and other property, real and personal, of *Shah Assud Oollah*, which had descended to *Sayyut Shah Enayet Hossein*; but, previously to the execution of such orders, *Mussumat Shurruffutoonnissa*, the wife of *Sayyut Shah Enayet Hossein*, and one of the present Respondents, presented a petition to the *Zillah Judge*, stating that a deed of gift of the real property advertised for sale had been executed by *Shah Assud Oollah*, in favour of *Sayyut Shah Enayet Hossein*, in the year 1811, and had been assigned to her by her husband in lieu of dower by a deed of sale, and that she had obtained a decree from the Provincial Court of *Moorshedabad*, dated the 17th of May, 1830, for the property embraced in the deed of sale. *Syed Willayut Hossein*, and others, also presented a petition to the *Zillah Judge*, stating that they had a half share in the *Mouzahs* advertised for sale.

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The objections raised by the petition of *Mussumat Shurruffutoonnissa* were disallowed by the *Zillah Judge*; and the consideration of the other petition postponed. On the 29th of December, 1837, an order was passed for sale of half of the real property of *Sayyut Shah Enayet Hossein*. *Mussumat Shurruffutoonnissa* being dissatisfied with the order of the *Zillah Judge*, preferred a summary appeal to the *Sudder Dewanny Adawlut*; and, on the 31st of January, 1839, that Court reversed such order and

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ordered all the property comprised in the decree of the Provincial Court of *Moorshedabad* to be released, upon the ground that, on the face of the documents filed by *Mussumat Shurruffutoonnissa*, no summary order disturbing her possession could be passed.

A sum of Rs. 25 only was realised by the sale of the moveable property of *Shah Assud Oollah*, left to *Sayyut Shah Enayet Hossein*.

Several efforts were afterwards made to recover from the surety of the original Appellant the money due to the East India Company ; but it was found that his landed property had already been sold, partly for arrears of Government revenue, and partly in execution of decrees enforced by decree holders ; and nothing could be obtained from him. The Government, then, at various dates, presented petitions to the Court of the Principal *Sudder Ameen*, praying for the arrest of *Sayyut Shah Enayet Hossein*, and for the sale of other property belonging to him. But upon certain objections being taken to the proposed sale, an order was made by the *Sudder Dewanny Adawlut* on the 15th of *May*, 1849, prohibiting the sale. Afterwards, in conformity with the directions of the *Sudder Court*, contained in a letter from that Court, dated the 3rd of *September*, 1850, an order was made by the *Zillah Court* on the 6th of *December* in that year, whereby an apportionment was made of the sum of Rs. 31,019. 0a. 12p. due for costs, as specified in the Order in Council; and it was declared that of that amount, the sum of Rs. 26,027. 8a. was due from the original Appellant, *Shah Assud Oollah*, and the sum of Rs. 4,991. 9a. 2p. was due from the original Respondent, *Mussumat Emamun*. The whole of the latter sum was subsequently realized by the Government.

In the meantime, frequent attempts had been made to arrest *Sayyut Shah Enayet Hossein* for the debt due from him, but without success.

The Government then petitioned the *Zillah* Court, praying for the attachment and sale of the property of *Sayyut Shah Enayet Hossein*, but this petition was rejected by the Court.

Upon this, the Government filed a plaint on the 25th of *June*, 1852, in the Court of the Principal *Sudder Ameen* of *Zillah Bhagulpoor*, against *Mussumat Shurruffutoonnissa* and *Sayyut Shah Enayet Hossein* stating the facts above mentioned, and charging that the deed of gift to *Sayyut Shah Enayet Hossein* and the assignment to the Defendant, *Mussumat Shurruffutoonnissa* were fraudulent and collusive, and praying that the sum of Rs. 26,002. 8a., the sum declared to be due from *Sayyut Shah Enayet Hossein*, under the apportionment made by the order of the *Zillah* Court, dated the 6th of *December*, 1850, after deducting the sum of Rs. 25, and also the sum of Rs. 19,750. 1a. 9p., for interest thereon, might be awarded to them, and that an order of sale be issued of the landed property specified in a schedule annexed to the plaint, which was the same property as was claimed by the Respondent, *Mussumat Shurruffutoonnissa*.

The Respondents put in separate answers to the plaint, and thereby pleaded, amongst other things not material to the question raised in the present appeal, that the Government's right of action was barred by the Regulation of Limitations, *Ben. Reg. III.* of 1793, sec. 14, more than twelve years having intervened between the date of the summary order of the *Sudder Dewanny Adawlut*, of the 31st of *January*, 1839, and the date of the institution of the suit.

Replications to the answers were filed by the

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Government which, amongst other things, insisted that the rule of limitation pleaded by the Respondents was not applicable to the claim of the Government.

On the 19th of *June*, 1855, Mr. *Colin Macdonald*, the Principal *Sudder Ameen*, decided that the deeds on which the Respondent, *Mussumat Shurruffutoonnissa*, relied, were fraudulent and void; and that, in conformity with the provisions of clauses 1 & 2, sec. 2, *Ben. Reg. II.* of 1805, the claim of the Government, being for a public right, could be preferred within sixty years, and he accordingly made a decree in favour of the Government.

The Respondents appealed to the *Sudder Dewanny Adawlut*, and the appeal was heard before the full Court, consisting of Messrs. *Trevor, Lock, and Bayley*, and, on the 30th of *April*, 1858, Mr. *Trevor* and Mr. *Lock*, in opposition to the opinion of Mr. *Bayley*, made a decree reversing the decree of the Principal *Sudder Ameen*, upon the ground that the claim of the Government was not for a public right, as provided by cl. 2, sec. 2, *Reg. II.* of 1805, and, therefore, that the suit was barred by sect. 14, *Reg. III.* of 1793, as the suit had not been brought within twelve years.

From this decree the present appeal was brought.

19th June, 1860.
 An appearance was entered for the Respondents, but no case was lodged by them. When the appeal came on for hearing their Lordships* refused to hear the Respondents' Counsel unless a printed case was

* Present: Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge.

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lodged. Upon the Respondents undertaking to lodge a case, the hearing of the appeal was adjourned. A case having been lodged by the Respondents the appeal came on for hearing.

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Mr. *Forsyth*, Q. C., and Mr. *W. H. Melvill*, for
the Government of *Bengal*, and,

Mr. *Leith*, for the Respondents.

On the part of the Government, it was insisted, first, that their claim to be reimbursed the costs paid by the East India Company in the appeal prosecuted by them under the Statute, 3rd & 4th Will: IV., c. 41, sec. 22, and Orders in Council of the 4th of *September* and 18th of *November*, 1833, (a) was "a public right," within the meaning of cl. 2, sec. 2 of *Ben. Reg. II.* of 1805, and, therefore, could by cl. 2 of the section of that Regulation be preferred at any time within the period of sixty years from and after the origin of the cause of action. Secondly, that the payment of the costs had been demanded within twelve years and admitted, and that as the present claim of the Government was substantially a claim for the sale of land of which possession had been acquired by the Respondents by fraud, therefore, that the suit instituted by Government was not barred by sec. 14 of *Ben. Reg. III.* of 1793, and was within the exception contained in that section, there being "good and sufficient cause" shown why the Government had been precluded from obtaining redress. Upon these points they cited *Troup and Dyce Sombre v. The East India Company* (b), *Prannath Roy Chowdry v.*

(a) Knapp's P. C. Cases, Appx. pp. xxvii. & xxix.

(b) 7 Moore's Ind. App. Cases, 104.

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Rookea Begum (a), Rup Chand Sahu v. Jivan Lal Ray (b), and it was further argued that by analogy to the Statute of Limitations, 21st *Jac.* I. c. 16, sec. 3, the suit was not barred, as the claim for costs was made under an Order in Council which made the Government a decree holder, *Mildred v. Robinson (c)*.

For the Respondents, it was submitted, first, that as the claim was for costs incurred by the East India Company, under the Statute, 3rd & 4th *Will.* IV. c. 41, sec. 22, and the Orders in Council made thereon, and not by the Government of India, which was distinguished from the East India Company by Statute, 3rd & 4th *Will.* IV. c. 85; therefore, that the suit had been improperly brought in India in the name of the Government instead of the East India Company. Secondly, that the East India Company's claim for reimbursement of the costs incurred by them being in the character of agents appointed by the Crown, under the Statute, 3rd & 4th *Will.* IV., c. 41, to prosecute the appeal (an agency which the Crown could, under that Statute, have delegated to any other persons), did not, therefore, constitute a "public right" so as to bring the suit within the exception of sixty years provided by cl. 2 of sec. 2 of *Ben. Reg.* II. of 1805; and, thirdly, that as the period of twelve years from the time the cause of action accrued had elapsed before the suit was commenced, the Court in *India* was precluded, *Ben. Reg.* III. of 1793, from hearing and trying the suit by sec. 14. The cases of *Pudarut Dass v. Futteh Ali (d)*, *Sheoraj Singh v. Munsookh Rai (e)*, were referred to.

(a) 7 Moore's Ind. App. Cases, 332. (b) 5 Ben. Sud. Dew. Rep., 168.

(c) 19 Ves., 585.

(d) 7 Sud. Dew. Rep. N.W.P., 158.

(e) 7 Sud. Dew. Rep. N. W. P., 337.

Their Lordships' judgment was delivered by

The Right Hon. Dr. LUSHINGTON.

It will be necessary in this case merely briefly to advert to some of the circumstances which have given rise to the questions discussed at the bar. It appears that there was a suit of very old standing; of such great antiquity that even the parties do not attempt to state at what period an appeal to His late Majesty in Council was lodged against a decision of the *Sudder Dewanny Adawlut* at *Calcutta*. Some time prior, however, to the year 1833, an appeal had been preferred by *Shah Assud Oollah*, the father of one of the present Respondents, against *Mussumat Emamun*, as Respondent.

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In virtue of the Statute, 3rd & 4th Will. IV. c. 41, that had passed, giving authority to the Crown to appoint the East India Company to take charge of appeals and bring them to a hearing, the appeal was heard; the Appellant was condemned in costs; and the decree of the Court below affirmed. Previous to the hearing it seems that *Shah Assud Oollah* had died. It does not appear from any of the proceedings in this case that the present Respondent (his son) had anything to do with that appeal whatever individually; but his father having been condemned in the costs, proceedings were taken against the son, as possessing the property of his father, for the realization of the sum due for costs.

In the year 1837, the first proceedings in the present case were adopted, and the mode of proceeding was this:—The East India Company, in virtue of the rights they had acquired to recover the costs, proceeded against the son, and also against the wife. They proceeded for the purpose of rendering certain property, which was claimed by the wife as having

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been conveyed to her by deed of gift of her husband, amenable to the payment of those costs. These proceedings went on, and by a decree of the *Zillah* Judge, which was made on the 29th of *December*, 1837, a sale of half the real property of *Shah Enayet Hossein* was directed to be made. But *Mussumat Shurruffutoonnissa* was dissatisfied with this order, and appealed to the *Sudder Dewanny Adawlut*, and on the 31st of *January*, 1839, that Court reversed the order of the *Zillah* Court, and ordered all the property comprised in the decree of the Court below to be released, upon the ground, that no summary order could, in the existing state of things, disturb her possession.

Now, it is important to see what was really the tenor of that order as set forth in the judgment of the *Sudder Dewanny Adawlut*, which states the facts more particularly. It appears that this property had been registered in the Collectorate in the name of the Respondent; that it had been alleged to have been given up by deed of sale in lieu of dower, and that she had rightly or wrongly obtained a decree on the 17th of *May*, 1830, in her favour. Now, the *Sudder Adawlut* in that case very clearly intimated what was the state of things, namely, that it was impossible that the order of the Judge of the Court below could be affirmed, because the only mode of proceeding was that which they directed to be adopted, namely, to proceed regularly to bring the property to sale, and they held that no summary order disturbing her possession could be passed.

This took place, as has been stated, on the 31st of *January*, 1839, and no further proceedings were taken on the part of the Government to realize the payment of these costs by means of the sale of this particular property, until the year 1852, after a lapse

of thirteen years. When the case came to be prosecuted in 1852, the only objection we need notice was an objection made on behalf of the present Respondents, that the suit could not be heard on account of its being barred by the Regulations of Limitations.

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We will address our attention, therefore, to that question at once.

Two Regulations of Limitations have been adverted to by the Counsel for the parties before us, namely, Regulation III. of 1793, and Regulation II. of 1805. Assuming that it was possible that this suit might be governed by Regulation III. of 1793, Mr. *Forsyth* raised a question that it was excepted, by virtue of certain words found in that Regulation, from the operation of that Regulation, without reference to Regulation II. of 1805; and he stated that, the money had been demanded by the Government for the matter in question, and that the Defendants admitted the correctness of the demand. Now, that the money was demanded may be perfectly true, and that the Defendants might have admitted that the demand was claimable from some quarter or other, may be perfectly true: but that, according to the intent and meaning of the words of the Regulation, they admitted that there was a claim as against the property in question, there certainly is not one atom of evidence before their Lordships.

Their Lordships think, therefore, that that clause in the first Regulation can have no operation upon this case.

Let us, then, consider the further question raised. There is indeed this exception in the Regulation of 1793, "when, either from minority or other good and sufficient cause, he had been precluded from obtaining redress." We will not say that "other good and

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sufficient cause'' are not words so comprehensive that they might by possibility extend to anything that may in the ordinary meaning of those words constitute "a good and sufficient cause;" but is there any good and sufficient cause shown upon the present occasion? Here, in the month of *January*, 1839, there is an express warning given to the Government, who had then sought to make this property amenable for the costs, that the proper course was to commence a regular suit, and not to proceed in a summary mode. They had the proper course pointed out to them; they had pointed out to them the only course by which they could make this property amenable; and they neglected for the whole period of thirteen years to take any such measure. It is, therefore, quite clear, giving the most extensive meaning to the words, "other good and sufficient cause," that it is impossible to say that, "either from minority or other good and sufficient cause" they were precluded from obtaining redress.

We now come to what is certainly a very important point, namely, whether Regulation II. of 1805, extends to the present case, so as to enable the Government to sue, notwithstanding the lapse of time. Undoubtedly, the great object of the Regulation of 1805 was to prevent vexatious suits, in consequence of the litigiousness that generally prevails among the natives of India, and, in all probability, it was not intended at that time to embarrass the East India Company, or the Government of India. But, be that as it may, Regulation II. of 1805, sec. 2, cl. 2, expressly declares that this Regulation of Limitations should not be considered applicable to any suit for the recovery of "the public revenue," or for "any public right whatever" which might be instituted by or on behalf of Govern-

ment, with the sanction of the Governor-General in Council, or by direction of any public Officer or Officers who might be duly authorized to prosecute the same on the part of Government; or, secondly, to any claims on the part of Government, "whether for the assessment of land held exempt from the public revenues without legal and sufficient title to such exemption, or for the recovery of arrears of the public assessment, or for any other public right whatever."

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Now, the question turns on the meaning that ought properly to be attached to these words, "any other public right whatever." Perhaps it would be too strict a construction to say that these words shall be construed precisely to be *ejusdem generis* with those matters which are mentioned before, namely, "the assessment of land held exempt from the public revenue without legal and sufficient title to such exemption, or for the recovery of arrears of the public assessment;" but, although they may not be construed with that degree of strictness, yet they must be taken to depend upon the same principles, otherwise the word "public" would have no meaning.

This brings us to the consideration of the question, whether the recovery of these costs does or does not constitute a public claim? The Statute, 3rd & 4th Will. IV., c. 41, has been read, and we need not go through it again. By virtue of that Statute, His Majesty in Council might give such directions as He thought fit to the East India Company, or other persons, for the prosecution of these suits, and also might make such orders for security and for the payment of costs as His Majesty in Council should think fit. Accordingly, it appears that an Order in Council (a) was issued, with a view to carry into effect this Statute, and that Order in Council

(a) 2 Knapp's P. C. Cases, Appx. p. xxvii.

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directed the East India Company to appoint agents and Counsel for the different parties in the appeals then pending, to do all such matters and things as had been usually transacted and done by agents in the prosecution of appeals. Now, we are of opinion, that these were all private acts between individuals, and that they had not originally in their nature anything of a public character to be ascribed to them. It appears that His Majesty, by another Order in Council (a), directed that the East India Company should be "entitled to demand payment of their reasonable costs of bringing appeals to hearing by virtue of the said Act, to such amount and from such party and parties, and shall have a lien for the said costs on all monies, lands, goods, and property whatsoever which may be recovered in such appeals, and upon all deposits which may have been made, and all securities which may have been given in respect of such appeals." In other words, that Order in Council placed the East India Company in precisely the same place and position as the winning party would have been in if an appeal had come on in its ordinary course. It appears to their Lordships that the nature of this transaction was originally of a private character. It continued to be of a private character, and the only distinction that can be drawn is this, that the East India Company are the agents to assert the right of the originally successful party to the costs incurred in the appeal.

It has been observed in the course of this discussion that other persons might have been appointed, and nobody can for a moment say that, if it had pleased His Majesty in His wisdom to appoint anybody else to conduct these proceedings and to realize the costs, the parties so appointed would not have sued as

(a) 2 Knapp's P. C. Cases, Appx. p. xxix.

private individuals. It pleased His Majesty, however, to appoint the East India Company. Can the appointment of one particular agent change the whole character and nature of the transaction from beginning to end, and convert that which was originally a private transaction, and nothing but a private transaction, into a transaction of a public character so as to bring it within the terms of the Regulation on which we have commented? Their Lordships think that it did not.

Their Lordships are of opinion, therefore, that the decision of the Court below was right, and they will, therefore, humbly recommend Her Majesty to affirm that decision, with costs.

RAM GOPAL MOOKERJEA - - - - - Appellant,

AND

SAMUEL MASSEYK and THOMAS } Respondents.*
J. KENNY - - - - - }

On appeal from the Sudder Dewanny Adawlut at Calcutta.

Contract—Construction—Agreement remitting portion of debt and providing for payment of balance in instalments—Provision for recovery of whole in default—If penal—Time, if of the essence of the contract.

Pending the execution of decrees in suits between A., lessee, and B., under-lessee, for the balance of rent, C. purchased B.'s interest in the under-lease. For the protection of the property suits were then brought by C. against A. An *Ikrarnamah*, or agreement, was afterwards entered into by A. and C., to put an end to the litigation. This agreement recited that C. was indebted to A. in a certain sum which C. agreed to pay, upon a remission by A. of part of his claim, by two instalments at

IN this case the Appellant brought a suit against the Respondents to recover the sum of Rs. 12,829. 2a. 7p. for principal and interest due to him under an *Ikrarnamah* (deed of agreement), dated the 23rd of

28th & 29th
June, 1860.

* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

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September, 1850, executed by the Respondent, Masseyk.

The Appellant had a lease of a share of the *Pergunnah Mahmood Shahee*, appertaining to the *Zillah Jessore*, in *Bengal*; and the Respondent, *Kenny*, who possessed indigo factories in the neighbourhood, held an underlease of some of the lands comprised in the Appellant's lease.

The Appellant instituted actions and obtained decrees in the Civil Court of *Jessore*, against the Respondent, *Kenny*, for balance of rent due on the underlease, took out execution, and procured the attachment of the indigo factories in his possession, together with their appurtenances; and also procured the attachment of certain decrees obtained by the Respondent, *Kenny*, against divers of the debtors of his indigo concern, and adopted measures for effecting a sale of the attached property, and sold three of the decrees against debtors and received the proceeds.

The Respondent, *Masseyk*, purchased the entire

right of the Respondent, *Kenny*, to the concern, taking over the debts and credits, and obtained from the *Zillah* Judge in the different suits, orders for the release of the attached factories, from which orders the Appellant appealed to the *Sudder Dewanny Adawlut* in *Calcutta*, while, in three other cases, proceedings were still pending in the *Zillah* Court; and, on the other hand, four actions had been brought by the Respondent, *Masseyk*, against the Appellant, for matters connected with the above transactions.

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In this state of affairs, and after the hearing of one of the appeals by the *Sudder Dewanny Adawlut* had commenced, the Respondent, *Masseyk*, came to an amicable settlement with the Appellant; and, on the 25th of *September*, 1850, a deed of agreement, called an *Ikrarnamah*, was executed at *Calcutta*. This instrument, after reciting the facts above stated, proceeded in the following terms:—"Now, considering the sums in the said decrees obtained by you (the present Appellant) on account of the concern which I (the Respondent, *Masseyk*) have purchased, to be justly due to you, and being desirous to come to an amicable settlement for the money due to you, an account has been made of all the decrees that you have obtained against Mr. *Kenny*, up to the 30th *June*, 1850, and it has been proved that the sum of Rs. 33,589. 15a. 3p. is due to you, out of which, under an amicable settlement, I have agreed to pay you Rs. 25,000, and you have agreed to receive the said sum and make a remission. Out of the said sum of Rs. 25,000, you have received from the Court, Rs. 2,281, by the sale made to you of three summary decrees obtained by the said Mr. *Kenny* against *Kishen Chund Chuckerbutty*. After

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giving a deduction for this, the debt becomes Rs. 22,719, out of which this day Rs. 10,000, have been paid to you through your *Mookhtar, Jaggut Chunder Mitter*, and the Rs. 12,719, that remain due after the payment of the said sum (10,000) have been stipulated to be paid under these conditions:—That Rs. 6,000, out of the principal and interest on the said Rs. 12,719, whatever may become due from the 1st of *Bhadoon* last, will be paid on the 10th of *Magh* of the current year, by entering payment thereof on the back of this document; that the remaining Rs. 6,719, I will pay on the 10th of *Chete*, together with interest, enter payment thereof on the back of this *Ikrar*, and obtain the return of the said *Ikrar* and release; that whatever amount of money I may at any time pay, I will have payment thereof made on the back of this *Ikrar*; and no objection whatever in regard to payment is to be admitted, with the exception of payments recorded on the back of the *Ikrar*; and whatever sum of money I may at any time pay, you will first deduct the interest money out of that, and credit the balance for principal. As security for the payment of the said money, the whole of the indigo factories, with their appurtenances, &c., that you had cause to be taken in seizure, in execution of decrees, that is to say, the factory of *Dhun-nuggur*, the factory of *Lukheepore*, the factory of *Cheechooa*, the factory of *Puddumdee*, and the factory of *Shulghur Muddhooa*, together with my person and heirs, are held bound. If I fail to pay the whole of the money due to you, together with interest, after deduction of the remitted money, agreeably to the condition written, then the remission of the money that you have now made under the amicable settlement is not to hold good; and the

said remitted money will be justly due by me, and you will realize it by the sale of the hypothecated factories, and from me, my heirs, representatives, and executors, and, in the event of any other person purchasing the said factories, from the said purchasers; and you will file *Dustburdaree* (a petition for leave to withdraw a suit) in the cases in which you have had decrees enforced. You will also file *Dustburdaree* in the purchase made on your part in consequence of the sale ordered by the Judge, who had rejected the receipt filed regarding the payment of the amount of summary decree in No. 294, due by the judgment debtor, *Hur Soondrea Debea*, of *Turruff Subonee*. I give up my claims to the action instituted against you in the *Dewanny Adawlut* of *Zillah Jessore*, for excess of rent of *Dehee Kuppoorhaut*, and to the actions that I have instituted to set aside the three summary decrees against *Kishen Chunder Chuckerbutty*, which you have realized by causing sale to be made; and I will file *Dustburdaree* in the said suits, and whatever costs and expenses may be incurred in the said matter will be borne by me. Should Mr. *Kenny* hereafter prefer any claims against you in any other way, I will become answerable for the same, and they will have no connection with you, therefore I have executed this *Ikrar*."

The *Ikrarnamah* contained no stipulation as to the place where the instalments were to be paid, nor did it appear from the evidence that the Appellant intimated his wishes on the subject in writing.

Upon the day of the execution of this instrument, the Appellant and the Respondent, *Masseyk*, severally presented petitions for withdrawal of the suit to the *Sudder Dewanny Adawlut*, at *Calcutta*, stating the par-

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particulars of the amicable settlement which they had made with each other, and praying that the *Ikrarnamah*, and petitions of *Dustburdaree* should be admitted, and the suit be struck off the list of pending cases, and that the *Ikrarnamah*, together with the *Mookhternamah*, or power of attorney, under which it was executed (both of which were filed with the petitions), should be delivered to the Appellant, all which was accordingly ordered by the Court.

The Appellant resided in the *Zillah* of *Nuddea*, at some distance from *Jessore*. The *Mookhtar*, or agent of the Appellant, one *Deb Coomar Rae*, resided at *Jessore*, and held a general power to conduct on the part of the Appellant the cases relating to *Ijarah Mehals*, to which the Appellant was a party in the Civil Courts of *Jessore*, and to receive and to grant receipts in the Appellant's name, for any moneys due to the Appellant that were deposited, whether in the Civil Courts or in the office of the Collector. Accordingly, on the 10th of *Magh*, 1257,) 22nd of *January*, 1851), the day fixed by the *Ikrarnamah*, the Respondent, *Masseyk*, tendered to *Deb Coomar Rae* payment of Rs. 6,000, the amount of the first instalment of the portion still unpaid of the sum of Rs. 25,000, which the Appellant had agreed to accept in satisfaction of the decrees which he had obtained against the Respondent, *Kenny*. *Deb Coomar Rae* refused to receive the Rs. 6,000, alleging that the *Ikrarnamah* was not with him, but was in the house of the Appellant; but he promised at the same time, that he would send for the *Ikrarnamah*, and receive the money, and said that no interest should be charged after the day of tender.

Deb Coomar Rae not having performed this pro-

mise, the Respondent, *Masseyk*, on the 8th of *February*, 1851, presented a petition to the Civil Court of *Jessore*, stating that he had been tendering payment since the 10th *Magh* to the Appellant's *Mooktar*, in the *Zillah* of *Jessore*, of the Rs. 6,000, that were payable upon that date, but that the *Mooktar* had not taken the money, and that the object was not to take the money in accordance with the conditions of the deed, but thereafter to increase the interest.

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As there was no suit pending before the Court concerning this matter, the Court refused to make any order upon the petition.

On the 12th of *February* in that year, the Appellant presented a counter petition, in which, without denying that payment of Rs. 6,000, had been tendered to his *Mooktar*, alleged that if the Respondent, *Masseyk*, had intended to pay the money, there was nothing to have prevented his paying the money to the Appellant at *Beernugger*, and having the payment entered on the back of the deed and he expressed his readiness to receive the money from the Respondent, *Masseyk*, in the presence of the Court, and to file a petition of relinquishment in the cases in which the *Ikrarnamah* bound him to do; but he did not offer to produce the *Ikrarnamah*, and enter the payment on the back of it, as required by the *Ikrarnamah*; and he intimated an intention to require payment of the remitted sum of Rs. 8,589 15a. 3p., in consequence of the Rs. 6,000, not having been paid to himself on the 10th *Magh*.

On the 19th of *February*, 1851, the Respondent, *Masseyk*, again petitioned the Court, insisting that the intended payment should be entered upon the back

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of the deed, and praying that notice should be given to the Appellant to attend the Court, either in person or by *Mooktar*, or a *Vakeel* of the Court, to receive the Rs. 6,000, and to permit the payment to be entered on the back of the deed. The Judge thereupon ordered that a notice should be served, for the Appellant to receive the money from the Respondent, *Masseyk*.

The Appellant took no steps in the matter till after the 10th of *Cheyte*, when the second instalment became due. Then, on 12th *Cheyte*, 1257 (24th of March, 1851), he produced the deed to the Court, along with a petition, in which he expressed his willingness to receive the whole of the money of the instalments due 10th *Magh* and 10th *Cheyte*, with interest, and to allow them to be entered on the back of the deed; but he insisted that the money remitted by that instrument had become payable in full, and reserved his right to demand it. In this petition he asserted that at the time when the *Ikrarnamah* was executed, the Respondent, *Masseyk*, agreed that he would send the money to the house of the *Malyamin-dar*, or surety of the Appellant's lease, and have entry of payment made on the back of the deed.

On the 28th of March, the first instalment of Rs. 6,000, was paid in Court to *Deb Coomar Rae*, the *Mooktar* of the Appellant, and the payment was entered on the back of the deed.

The second instalment, which had become due on the 10th *Cheyte*, before the Appellant thought fit to receive the first instalment, was paid under the following circumstances:—Upon the 14th *Cheyte*, the day on which the first instalment had been received

by *Deb Coomar Rae*, the second instalment, consisting of Rs. 3,245 in bank notes, and Rs. 4,208. 11a. in cash, making in all Rs. 7,453. 11a., was tendered on behalf of the Respondent, *Masseyk*, to *Deb Coomar Rae*, who said that his dwelling was in the midst of a jungle, that he had not people with him, and that he could not receive so large a sum in cash without sending to his employer at *Beernuggur*, and obtaining thence *Beer-kundazes*, or armed servants, to convey it, and requested that the money might be kept for four days, stating that the interest would cease from that day. Five days after this, and on the 2nd *April*, 1851, he said that the Respondent might give him what money he wished to pay, and enter payment on the back of the *Ikrarnamah*; that he was willing to receive the money, but that he would not be able to return the deed, having been forbidden by his employer to do so.

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The day after this communication, the Respondent, *Masseyk*, presented a petition to the Court, in which he complained of the refusal to take the money and return of the deed, and then tendered the money, praying that *Deb Coomar Rae* should be sent for, and return to him the *Ikrar Kistbundee*. On the next day the Appellant presented a petition to the Court, in which, without denying the statements of the Respondent, *Masseyk*, in his petition, he insisted that the whole of the remitted money had become due, with interest, through the default of the Respondent, *Masseyk*, and offered to return the deed on receiving payment of it in full; but expressed himself willing to allow him to pay whatever money he might consider to be due, and to enter the payment thereof on the back of the

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deed, after which he would sue for the remitted money.

After some delay the Respondent, *Masseyk*, on the 5th *July*, presented another petition to the Court, and tendered Rs. 7,540. 10a. 8p., with an account, showing that this sum constituted the whole principal payable by him, with interest up to the 14th *Cheyte*, the day on which the tender was made; and he prayed that the money should be received by the Court and paid to the Appellant, and payment entered on the back of the deed, and that the deed should be ordered to be returned to him. That sum was paid to the *Mooktar* of the Appellant, and payment endorsed upon the original deed, which, however, was not given up to the Respondent, *Masseyk*.

The Respondent, *Kenny*, afterwards purchased back the indigo concern from the Respondent, *Masseyk*, taking over the debts and credits.

On the 21st of *December*, 1853, the Appellant filed his plaint in the Civil Court of *Zillah* of *Jessore*, against both the Respondents, for the amount of the remitted money with interest. In the pleadings, he, for the first time, objected to the tender made to *Deb Coomar Rae*, on the ground that the latter was not authorized to receive any money, except that which was in deposit in the Civil Court.

The Respondent, *Kenny*, alone appeared to the suit, and, by his answer, admitted his possession of the factories, and also the execution of the *Ikrarnamah* of the 25th *September*, 1850, but contended and submitted that the real intent of the condition therein was not as contended for by the Appellant, and averred that the Appellant had not been put to, or

suffered any, trouble or loss in that behalf. He further alleged, that the Appellant had been guilty of fraud in not receiving the money, stating that the first instalment was Rs. 6,000 only, and had been duly tendered to the *Mooktar* of the Appellant at *Jessore*; and the answer also averred that the second instalment due on the 22nd of *March*, 1851, had also been duly tendered to the same *Mooktar* by a tender made on the 26th of *March*, 1851, when the *Mooktar* stated that no interest would be charged from that date; and after stating the ultimate payment of the above two sums to the Appellant, he denied the Appellant's right to recover any further sum under the *Ikrarnamah*.

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The Appellant by his replication denied that the Respondent, *Kenny*, had rightly interpreted the condition in the deed. He also denied that any tender had been made within the stipulated time, and contended that, even if made to the Appellant's *Mooktar* at *Jessore*, the same would not have been a sufficient tender, as it ought necessarily to have been made to the Appellant himself, and not to his *Mooktar*, who had no authority in that behalf from the Appellant. He also expressly denied that any tender had been made in respect of the second instalment, and contended that, if made as alleged, it would not have been a good tender, the money having previously become due on the 22nd of *March*, 1851.

No witnesses were examined by the Appellant. The Respondent produced as evidence on his part an attested copy of the *Mookhtarnamah* granted by this Appellant to *Jeb Koomar Rae*, his *Mookhtar* at *Jessore*, and he also examined several witnesses. The evidence of these witnesses was to the effect, that the

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money due for the two instalments was tendered on two occasions to the Appellant's *Mookhtar* at *Jessore*, and that such money belonged to and was sent by the Respondent, *Kenny*, by whose agent the tenders were alleged to have been made; that the sum first tendered was Rs. 6,000, only; that the tender of the second sum was on the 25th or 26th of *March*, the second instalment being fixed on by the *Ikrarnamah* as payable on the 22nd of *March*; that on both occasions the Appellant's *Mookhtar* declined to receive the money, and stated that he had not the original *Ikrarnamah*, and that on the second occasion he stated that he had no means of securing the money, and could not receive it till he had procured people for that purpose from the Appellant, but that on both occasions the agent declared that the tenders should have the effect of preventing the interest continuing to run. The Appellant's *Mookhtar* was summoned as a witness by the Respondent, but he did not appear.

The hearing of the suit took place on the 30th of *June*, 1855, when the Principal *Sudder Ameen* (*Baboo Opendur Chunder Nayerutton*) dismissed the suit. By this judgment the Principal *Sudder Ameen* found that the Respondent, *Kenny*, had proved the tender and payment of the instalments to the *Mookhtar*. On the question as to the nature of the condition in the deed, the judgment of the Court was as follows:—"In the next place, even had there been any fault on the part of the Defendants in respect to this, yet the Plaintiff cannot obtain the said money, because had the Defendants failed to pay the instalment, the condition of the *Ikrar* would have been rendered null, and the Plaintiff would have become

entitled to the whole of the amount that had been due on the decrees. It was incumbent on him not to have taken the money that the Defendants had deposited, and to have resorted to such measures as were necessary for the realization of the entire sum of money. By his not having so done, and by his having taken the money deposited by the Defendants without his consent, it is to be considered that he himself had set aside the said condition, and realized the money; otherwise it was proper for him, at the time of taking the said money, to have made the Defendants admit their fault in not having paid the money (in accordance with the specified time), and then to have taken the said money. When the Plaintiff did not so act, but took the money according to his pleasure, it is to be concluded that he had taken the money, having himself relinquished the claim to receive the money that he had remitted. With regard to the sentence that he has written in his petition to the Judge with a view to his own benefit, that he will hereafter institute an action on a claim for this very money, that cannot remedy his defect; it is, therefore ordered, that the suit be dismissed, and that the Plaintiff pay the Defendants' costs, with interest from this date to the date of realization."

The Appellant appealed to the *Sudder Dewanny Adawlut* at *Calcutta*, submitting, as grounds of appeal, first, that the whole of the original debt was recoverable, the two several instalments not having been paid in conformity with the conditions in the *Ikrar-namah*, and within the stipulated time; secondly, that having expressly, by his petition filed in Court, reserved his rights, and received the two sums paid to him as aforesaid in part payment only, and without prejudice to his right to recover the whole original

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debt, he could not be barred thereby from recovering the balance.

To these grounds the Respondent, *Kenny*, who alone appeared to the appeal, by his answer, contended, first, that the Appellant having fraudulently and purposely neglected to receive the money at the appointed times, the Respondents were never in default, and the whole original debt could not, therefore, be claimed; and, secondly, that Appellant's claim was barred by his having received the two instalments paid to him.

The hearing of the appeal took place on the 22nd of *January*, 1857, when the Judges of the *Sudder* Court, consisting of Messrs. *Colvin*, *Sconce* and *Torrens*, unanimously dismissed the appeal, with costs.

From this decree of affirmance, the present appeal was brought.

Mr. *R. Palmer*, Q. C., and Mr. *Leith*, for the Appellant.

No legal and sufficient tender of the first or second instalments has been proved to have been made to any one who had the authority and legal capacity to receive the same for the Appellant. Now, the *Ikrarnamah* expressly provides, that if default be made in paying the balance due with interest thereon, according to the particular conditions prescribed by that instrument, the sum of money which had been agreed to be deducted from the original debt should become, *ipso facto*, due and recoverable. Here the interest was not tendered. Then as default was established, and neither of the two instalments of the balance due having been paid at the date, or at any time in full according to the conditions, the Respondent was, upon the breach, entitled to the sum sued

for. In *Davies v. Penton* (a), it was held that as an agreement had not been complied with, a condition annexed, that in the event of non-compliance the remission was not to be allowed was a penalty which could be recovered at law. *Ford v. The Earl of Chesterfield* (b) is on all fours with the present case. There a mortgagee agreed to take a portion of his debt, in lieu of the whole, upon payment upon a given day, and that not being done, the Court of Chancery refused to give relief against the effect of its non-payment on that day [Lord Kingsdown :—That case differs from the present. Here it was not a debt for which *Masseyk* was liable.] Time was the essence of the contract, and punctual payment the very consideration for the remission of part of the debt. *Davis v. Thomas* (c). It is an idle excuse to say that as there was no place mentioned in the *Ikrarnamah* where the money was to be paid, that he could not pay the Appellant himself. The answer to that argument is, that where there is no agreed place of payment, the residence of the creditor or his place of business was the proper place, which ought to have been found out by the debtor, and the principal and interest then due paid to him, which has not been acted upon here.

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Mr. Rolt, Q. C., and Mr. W. Macpherson, for the Respondents.

The full amount secured by the *Ikrarnamah*, with interest, has been received by the Appellant. That instrument does not specify any place of payment, nor did the Appellant ever appoint a place either for payment or for the production of the deed, nor was

(a) 6 Bar. & Cress. 216.

(b) 19 Beav. 428.

(c) 1 Russ. & Myl. 506.

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payment on the day an essential part of the contract. The facts differ from *Ford v. The Earl of Chesterfield*, which does not apply. The Respondent, *Masseyk*, was ready with the money, and used all reasonable means to compel the Appellant to receive the same at the time appointed. The sum of Rs. 33,589. 15a. 3p. mentioned in the *Ikrarnamah* was intended merely as a penalty to secure the payment of Rs. 25,000 with interest. There was a substantial effort to pay on the part of the Respondent, while the Appellant avoided the receipt of the money, for the purpose of founding his claim to the larger amount. If the conditions of the *Ikrarnamah* have not been literally performed, such non-performance was owing to the conduct of the Appellant himself. It was not necessary to tender a specific sum, *Ashmole v. Wainwright (a)*.

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Their Lordships' judgment was delivered by

The Right Hon. Lord KINGSDOWN:

This is a suit brought by the Appellant to recover Rs. 12,829, alleged to be due to him from the Respondents under an *Ikrarnamah*, or agreement.

It appears that the Appellant was the lessee of certain lands in the *Zillah* of *Jessore*, and that the Respondent, *Kenny*, who was the proprietor of several indigo factories in that District, was under-lessee of a portion of the property.

The Appellant alleged that a large sum was due to him from *Kenny* for rent, and he brought several actions in the *Zillah* Court of *Jessore* to recover the amount, and issued attachments against *Kenny's* factories and other property.

(a) 2 Q. Ben. Rep. 837.

In 1850, while this litigation was pending, the other Respondent, *Masseyk*, intervened, and alleged that he had become the purchaser of the interest of *Kenny*, and he objected to any sale being made under the attachments.

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He obtained an order to stay the sale under four of the attachments, from which order the present Appellant appealed to the *Sudder Dewanny Adawlut*, and that appeal was pending at the time when the engagement on which the question before us was raised, was entered into by *Masseyk*; besides which three other execution of decree cases were pending for trial in the *Zillah*, and other actions were brought by *Masseyk* against the Appellant.

In this state of things the instrument in question was executed by *Masseyk*, on the 25th of *September*, 1850.

It is in the Bengalee form and language, and is addressed by *Masseyk* to the Appellant. It recites the circumstances already stated, and that *Masseyk* was desirous of coming to an amicable settlement for the money due to the Appellant, that the amount due to the Appellant from *Kenny* had been proved to be Rs. 33,589. 15a., 3p., and of which under an amicable settlement *Masseyk* had agreed to pay to the Appellant Rs. 25,000, and that the Appellant had agreed to receive that sum and make a remission.

The agreement then states that certain sums had already been received by the Appellant in part of the Rs. 25,000; that at the time of the execution of the instrument Rs. 10,000, more had been paid to the Appellant through his *Mooktar*, leaving Rs. 12,713; and that *Masseyk* agreed to pay this sum, with interest, from the 1st *Bhadoon* (16th *August*, 1850) by

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two instalments, one of Rs. 6,000, for principal, on the 10th *Magh* (22nd of *January*, 1851), and the other of Rs. 6,719, for principal, on the 10th *Chete* (23rd of *March*, 1851). In what way the interest was to be paid we will consider presently. The payments were to be endorsed on the back of the *Ikrar*: then follow these words:—"And whatever sum of money I may at any time pay, you will first deduct the interest money out of that, and credit the balance for principal."

The factories are then pledged for the payment of this money, as well as the personal liability of *Masseyk*. Then follow these words:—"If I fail to pay the whole of the money due to you, together with interest, after deduction of the remitted money, agreeably to the condition written, then the remission of the money that you have now made under the amicable settlement is not to hold good, and the said remitted money will be justly due by me, and you will realize it by the sale of the hypothecated factories, and from me, my heirs, representatives, and executors, and in the event of any other person purchasing the said factories from the said purchaser." Provision is then made for putting an end to the several suits subsisting between the different parties.

It is to be observed that, although the debt from *Kenny* to the Appellant might be Rs. 33,589, 15a., 3p., it by no means followed that the property which *Masseyk* had purchased was liable to the payment of the whole of that sum; and, whatever might be the liability of the property, *Masseyk* was, previously to this agreement, under no personal liability. By the agreement he made himself personally liable to the extent of Rs. 25,000, for the debt of another; of

which sum nearly half was actually paid at the time; and these payments made, and to be made, were part of an arrangement for a general settlement of the various disputes then pending between the parties, and for the dismissal of the suits.

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There is nothing in the agreement which makes the payment of the instalments on the days fixed on the essence of the contract, unless that stipulation is to be inferred from the words, "If I fail to pay agreeably to the condition written."

Instead of there being in any other part of the agreement anything to favour this construction, the nature of the engagements on each side, and the clause to which we have referred as to any payments on account being applied first to payment of interest, appear to us to furnish an implication to the contrary.

It being a part of the agreement that the suits in the *Zillah* Court and the *Sudder Dewanny* Court should be abandoned, the *Vakeels* of both parties, on the day of the date of the agreement, brought it under the notice of the *Sudder Dewanny* Court by petition. It was also, on the same day, brought to the notice of the *Zillah* Court.

The first instalment of Rs. 6,000, became due on the 22nd of *January*, 1851: it was not actually paid till the 21st of *March*, 1851.

The second instalment became due on the 23rd of *March*, 1851, and was not received by the Appellant until the 5th of *July*, 1851. Under these circumstances the Appellant has brought his action against *Masseyk* and *Kenny*, insisting that the agreement has not been performed according to its tenor, and that he is, therefore, entitled to receive the

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payment of the whole amount of 8,000 and odd rupees, which, he says, were only to be remitted on the condition of the less sums being paid punctually on the specific days mentioned in the agreement.

On the part of the Respondent it is contended, that payment on the day was no essential part of the contract; that this is not the case of a creditor engaging to remit to his debtor a portion of his demand in consideration of his making payment of smaller sums punctually at fixed periods, in which case the punctuality of payment is the only consideration which the creditor receives for his indulgence; that this case does not, therefore, fall within the principle of *Ford v. The Earl of Chesterfield* (19 Beav. 428), relied on by the Appellant, but is a case in which a third person, being under no liability, consents to incur that liability, and binds himself in a penalty for the due performance of his engagement.

The Judges of the *Zillah* Court, and all the Judges of the *Sudder* Court, have decided against the claim of the Plaintiff, the present Appellant; and their Lordships have to consider whether any sufficient reasons have been urged for disturbing those decisions.

Their Lordships are of opinion, that they ought not to apply to this case the nice technicalities of English law, that they must look at the agreement with a view to see what the real intention of the parties was, and must inquire whether it appears upon the evidence that there has been any failure by the Respondents in the substantial performance of the contract, and if there has been any default, to whom such default is attributable.

It appears to their Lordships to be sufficiently

proved, that on the 10th *Magh*, the Respondent, *Masseyk*, through his *Mooktar*, offered to pay to *Deb Coomar Rae*, the *Mooktar* of the Appellant, in the *Zillah* of *Jessore*, the sum of Rs. 6,000, as the first instalment due under the agreement, and that *Deb Coomar Rae* declined to receive it, alleging that he had not in his possession the *Ikrarnamah* on which the receipt of the money was to be indorsed. This instrument is said to have been in the possession of the Appellant himself, who resided at some distance from *Jessore*.

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It is objected, on the part of the Appellant, to this offer: First, that the offer did not include the interest which ought at that time to have been paid. Second, that *Deb Coomar Rae* had no authority to receive the money on behalf of the Appellant. Third, that the Respondent was bound to seek out the Appellant on the day of payment, and to tender to him the exact amount of principal and interest then due.

First. Their Lordships, on consideration, are of opinion (contrary to the impression which they at first entertained) that by the agreement the interest on the Rs. 12,719, up to the day of payment was to be paid at the same time with the Rs. 6,000, and that, therefore, if it were necessary to prove a strict legal tender, such tender was not made; but they are satisfied that the omission to include the interest arose merely from a misapprehension of the ambiguous words of the agreement, and that such omission was not the reason why the money was refused, and they think that a strict legal tender was not necessary.

Second. They are by no means satisfied that *Deb Coomar Rae* had not authority to receive the money. He has not been examined by the Appellant, and he

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was summoned as a witness by the Respondent and he failed to appear. He was the person through whom, if the attachments against the property had been prosecuted, the money would have been recovered, and to whom it would have been paid in the *Zillah* Court; and he was, therefore, the person to whom the Respondent might well imagine that the *Ikrarnamah*, on which the payment of the money was to be endorsed, would be transmitted by the Appellant. There seems no improbability in the statement of the Respondent's witnesses that *Deb Coomar Rae* said that he would send for the *Ikrarnamah* that the indorsement might be made upon it.

Third. There seems to have been uncertainty on both sides as to the place at which the *Ikrarnamah* was to be produced and the money was to be paid. The instrument was executed at *Calcutta*, where the Appellant had a *Mooktar* it related to property at *Jessore*, where the Appellant had another *Mooktar*. The deed had been sent from *Calcutta* to be produced in the *Zillah* Court of *Jessore*. The Appellant resided at *Beernugger*, and had a place of business at *Kishnugger*. It is stated by the Respondent that it was verbally settled, after the execution of the *Ikrar*, that the money should be paid to the Appellant's *Mooktar* in the *Zillah* of *Jessore*, and that the Appellant would send the *Ikrar* to him. There is, however, no proof of this. On the other hand, the Appellant does not allege that there was any place fixed, either by agreement or by custom, or by rule of law, where the payment should be made. He suggests, indeed, at different times in the course of the proceedings, that the payment or tender might have been made to his *Mooktar* at *Calcutta*, or to himself

at his house at *Beernugger*, or at the house of the *Malzamendar* of the *Ejarah*. To these the place of business of the Appellant at *Kishnuggur* was added in the discussion at our Bar as a proper place for making the tender.

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Upon the whole their Lordships are satisfied that there was a *bona fide* endeavour on the part of the Respondent fairly to perform his engagement, and that there is much reason to believe, with some of the Judges in the Court below, that there was a desire on the part of the Appellant to throw obstacles in the way of the performance, in order to obtain payment of the penalty which he expected would be the consequence of non-performance.

The principle of these observations applies to the second instalment as well as the first, and their Lordships have arrived without hesitation at the conclusion that the main ground of the appeal entirely fails, and that if the Appellant has received the full amount of the principal sum of Rs. 12,719, with interest upon that sum till the time of payment, he has received everything which he can justly claim.

They are not, however, satisfied that he has received the full amount of interest which he might reasonably demand; because it appears that with respect to the last instalment there was an interval of several months, during which time no interest was calculated, the delay of payment during that period having arisen, as it is suggested, from the accidental absence of the European Judge from *Jessore*. It appears, however, that this point is not stated in the reasons of appeal laid before the *Sudder* Court, nor does it appear to have been suggested below. The sum would, probably, have been allowed if it had been

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asked, and if it had been refused the amount would have been far below that for which an appeal to this country can be brought.

Under these circumstances, their Lordships think they would not be justified in modifying on this ground the order which they must humbly advise Her Majesty to make, namely, an order that this appeal be dismissed, with costs.

DOORGA DOSS CHOWDRY - - - - - Appellant,

AND

RAMANAUTH CHOWDRY, and others - - Respondents.*

On petition from the Sudder Dewanny Adawlut at Calcutta.

Privy Council—Appeal to—Valuation—“Subject matter”—If includes costs and subsequent interest.

Costs of suit cannot be added to the principal sum and interest, in calculating the appealable value of Rs. 10,000, the amount restricted by the Order in Council of the 10th of April, 1838.

5th Dec.,
 1860.

This was an application by *Doorga Doss Chowdry* for special leave to appeal from a decree of the *Sudder Court* reversing a previous decree of the *Zillah Court* of *Rajshahyl*, in a suit instituted in the year 1857, by the Petitioner against *Ramanauth Chowdry*, the executor of one *Kallykanth Lahory*, deceased, to recover the principal and interest due on a Bond conditioned for the payment of the sum of Rs. 8,250, and interest at the rate of eight per cent. per annum, alleged to have been executed by the deceased in favour of the Petitioner.

Present : *Members of the Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

It appeared that the Petitioner's claim was laid in the plaint at Rs. 9,274. 6a., including the interest due, in order to fix the value of the stamp, in accordance with *Ben. Reg. IV.* of 1793. The cause was heard on the 23rd of *October*, 1857, when the Principal *Sudder Ameen* decided in favour of the Petitioner, and decreed that the Petitioner receive the total of the amount of the claim, Rs. 9,274. 6a., and the interest on the principal sum during the period the suit was pending trial, and costs, together with interest on the consolidated sum from that date up to the day of realization.

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Ramanauth Chowdry, the Defendant, appealed to the *Sudder Court* at *Calcutta* from this decree, and that Court, on the 29th of *February*, 1860, reversed the decree of the *Zillah Court*, and allowed the appeal, with costs.

The amount originally laid in the plaint being under Rs. 10,000, the appealable value fixed by the Order in Council of the 10th of *April*, 1838, no application was made by the Petitioner to the *Sudder Court* for leave to appeal to Her Majesty in Council, but the present petition was presented for liberty to enter and prosecute such appeal.

Mr. *Leith*, for the Petitioner,

Submitted, that the original decree being for a sum of Rs. 9,274. 6a., which with the additional interest accrued due and payable thereon since the date of the plaint, under the provisions of the Bond, and the decree of the *Zillah Court*, together with the costs of suit, would exceed Rs. 10,000, and that sum must be considered as the value of the matter in dispute, which would bring the case within the intent and meaning of

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the Order in Council of the 10th of *April*, 1838, and that the Petitioner was, therefore, entitled to appeal.

Mr. *W. Field*, for the Respondents, *contra*.

The Right Hon. Lord CHELMSFORD:

The amount absolutely decreed by the Court is Rs. 9,274. 6a., the interest added to that for the time specified, at 8 per cent., would, according to the Petitioner's calculation, raise the sum due to Rs. 9,310; that is under the appealable sum. It has been determined a short time ago by their Lordships, in the case of *Maharajah Sutteeschunder Roy v. Guneschunder (a)*, that the *Sudder Courts* have no authority under the Order in Council of the 10th of *April*, 1838, to add the interest accruing subsequent to the decree to the capital sum decreed for the purpose of reaching the appealable amount; here the interest, under any circumstances, would not be sufficient, for, to arrive at the necessary amount, you must add, as you seek to do, the costs. Now, the costs of a suit are no part of the subject matter in dispute, and cannot be used for the purpose you seek; if they were allowed to be added to the principal sum claimed, it would be in the power of every litigant, by swelling the costs, to bring any suit up to the appealable value. Their Lordships are clearly of opinion, that the sum in issue in this suit is not sufficient to bring the case within the Order in Council, and no merits are stated which entitle the Petitioner to the special favour he asks. They refuse the application, with costs.

(a) 8 Moore's Ind. App. Cases, 164-8. See also Goorooopersad Khoond v. Juggutchunder. 8 Moore's Ind. App. Cases, 166.

JOYKISSEN MOOKERJEA - - - - Appellant,

AND

THE COLLECTOR OF EAST BURDWAN }
and Others - - - - - } Respondents.**On petition from the Sudder Dewanny Adawlut at Calcutta.**Privy Council—Special leave—Question involved in several suits—If justifies grant of leave.*

Special leave to appeal given in a case involving a question of tenure service, called *Chakeeran*, although the subject matter in dispute was below the appealable value ; there being many other suits depending on the decision of the case.

THIS was a petition for special leave to appeal in a case in which the sum in dispute was laid at Rs. 200 only, but which involved an important question of tenure of certain land, as well as of other lands sought to be resumed, respecting which no less than thirty suits were brought.

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The object of the suit in question was to resume and recover possession of 19 *Beegahs* of land situate in the *Mouzah* of *Gobinpore*, of which the Petitioner was the *Talookdar* from one *Almud Buksh*, alleged to be held by him on a tenure called *Chakeeran* (lands held by servants in lieu of wages), and which had been originally assigned to him on the condition of his rendering and performing certain services and duties connected with the Petitioner's *Talook*, such duties being to guard the house of the *Talookdar*, the

* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Lord Kingsdown, and the Right Hon. Dr. Lushington.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

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Mal-cutcherry, and the village ; and that as he had ceased to perform those duties, the Petitioner was entitled to resume the land ; but, nevertheless, the Defendant retained possession of the land, insisting that the land which the Petitioner claimed was *Malguzary*, by reason of which, and other Government claims, the Petitioner was compelled to make the Collector of *Burdwan*, the *Zillah* in which the lands were situate, a co-defendant.

It appeared that this suit was only one out of thirty which had been commenced about the same time, and under similar circumstances, by other *Talookdars*, in respect to the *Chakeeran* lands, against other parties, for having been deprived of similar services by their tenants.

The Petitioner obtained decrees in his favour by the Principal *Sudder Ameen* in two of the suits, which declared that Petitioner had authority to resume the lands in question under sec. 14 *Ben. Reg. VIII.* of 1793.

From these decrees the Government obtained special leave to appeal, and the suits were remanded for trial on certain issues then fixed, which the Petitioner alleged were not properly adhered to by the Judge of the *Zillah* Court, to whom the cause was referred ; and who by his decree dismissed the Petitioner's suit. The Petitioner appealed from this decision to the *Sudder* Court, the Judges of which affirmed the decree of the Court below, stating their opinion, on the question of tenure, against the Petitioner's right to resume.

Under these circumstances, and the case being one involving a question of tenure on which many holdings depended, and in which there were other suits already pending, the Petitioner prayed for liberty to appeal.

Mr. *Leith*, for the Petitioner,

Relied on the circumstances above stated, and the importance of the question at issue, and the number of suits involving the same right. Upon the question of value, *Spooner v. Juddow* (a) was cited ; and the public importance of the nature of the tenure, *Raja Lelanund Sing Bahadoor v. The Government of Bengal* (b) referred to.

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Mr. *Forsyth*, Q. C., and Mr. *W. H. Melvill*, on behalf of the Collector of *East Burdwan* and the Government,

Opposed the application, insisting, first, on the extreme smallness of the amount at issue as precluding an appeal ; and, secondly, the want of sufficient evidence that the other suits involved the same question, or would be governed by any decision in this case. They contended that the Petitioner ought to have produced an affidavit of that fact.

The Right Hon. Lord KINGSDOWN :

Their Lordships are of opinion that this is a fit case to advise the allowance of a special appeal. They reserve the question of costs ; security to the amount of £300, must, however, be given by the Petitioner.

(a) 4 Moore's Ind. App. Cases, 353. See also *Sumbhoolall Girdhurlall v. The Collector of Surat*, ante, p. 17.

(b) 6 Moore's Ind. App. Cases, 101.

GOURMONEY DEBLA - - - - - Appellant,
 AND
 KHAJA ABDOOL GUNNY - - - - - Respondent.*

On petition from the Sudder Dewanny Adawlut at Calcutta.

Privy Council—Appeal—Valuation for purposes of—Actual value of the property, if to be taken into account.

Appeal admitted from the Sudder Court at Calcutta, in a case where the land sued for was laid in the plaint as under Rs. 10,000 ; upon evidence stating the value of the property much to exceed that sum.

5th Dec.,
 1860.

THIS was an application for special leave to appeal from a decree of the *Sudder Dewanny Adawlut*, of *Calcutta*, affirming a previous decree of the Principal *Sudder Ameen* in a suit instituted by an alleged mortgagee against the Petitioner, a purchaser for valuable consideration in possession of certain lands, the possession of which was sought to be obtained by the suit.

It appeared that the value of the property was laid by the Plaintiff at Rs. 7,182 odd, three times the amount of the annual *jumma* of the land, in order to fix the amount of the stamp to be used on the plaint, although the purchase-money paid by the Petitioner amounted to Rs. 19,000.

The decrees in both Courts being against the Peti-

* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Lord Kingsdown, and the Right Hon. Dr. Lushington.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

tioner she presented a petition for leave to appeal to Her Majesty in Council, praying, under the circumstances, for liberty to appeal from the decree of the *Sudder Court*.

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The application was supported by depositions taken in *India* as to the value of the property in question, made by two native residents, who stated that the actual value of the property was of much larger amount than Rs. 10,000. The statements in the petition were verified by the affidavit of the Solicitor in the appeal, who deposed to their being taken from the record of the proceedings in the suit.

Mr. *Leith*, for the Petitioner.

Their Lordships allowed the appeal, on security being given by the Appellant to the amount of £300, subject, as the application was *ex parte*, to the Order admitting the appeal being dismissed, on application by the Respondent.

SALIK RAM AND HURARAM - - - - - *Plaintiffs,*

AND

AZIM ALI BEG - - - - - *Defendant.**

On petition from the Court of the Judicial Commissioner for the Province of Oude.

Privy Council—Appeal—Special leave—Grant of to prevent denial of justice—Prerogative.

No provision by Statute, or Charter, being made for appeals to Her Majesty in Council from judgments of the Court of the Judicial Commissioner of *Oude*, created on the annexation of that Kingdom in the year 1858, the Judicial Committee, to prevent the denial of justice, admitted an appeal, under Statute, 3rd & 4th Will. IV., c. 41.

24th March,
1862.

THIS was a special application for leave to appeal from a judgment of the Judicial Commissioner for the Province of *Oude*, pronounced in a suit in which the Petitioners were Plaintiffs, and *Azim Ali Khan*, Defendant.

The facts which gave rise to the application were these:—

In the month of *February*, 1856, the Kingdom of *Oude* was annexed to the territories of the East India Company, and became the Province of *Oude*, belonging to the Government of India.

By a despatch of the Governor-General in Council, dated the 4th of *February*, 1856 (*a*), Courts of Justice were established in the Province of *Oude*, including, amongst others, the Courts of the Judicial Commis-

* Present: Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

(*a*) Parl. Papers relating to *Oude*, 1856, p. 257.

sioner, and of the Deputy-Commissioner for that Province ; and it was ordered that the Judicial Commissioner should be charged with the direction and control of the administration of civil and criminal justice, and that he should be the ultimate Judge in all cases of a judicial character, and that the Deputy-Commissioner should try all original suits for property real or personal exceeding in value Rs. 1,000, and that an appeal should lie from his decision in such cases to the Commissioner, whose order was ordinarily to be final.

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On the 7th of *August*, 1860, the Petitioners instituted a suit in the Civil Court of *Lucknow*, in the Province of *Oude*, before the Deputy-Commissioner, to recover the sum of Rs. 18,630, for principal and interest upon a bond. The point turned upon a question of limitation of time in bringing the suit ; and that Court upon that question decided against the Plaintiffs, who appealed therefrom to the Court of the Judicial Commissioner for that Province, who, by his judgment, affirmed the decision of the Deputy-Commissioner. The Petitioners were desirous of appealing from such judgment of affirmance to Her Majesty in Council as being erroneous in law, and took the necessary steps by presenting a petition of appeal, within the ordinary time limited for appealing from the Courts in India. After inquiries by the Judicial Commissioner to the Government officer Mr. *Campbell*, as to his power to allow such an appeal, and a reference upon that point to the Advocate-General (who in a letter, dated the 9th of *January*, 1862, referred to the opinion of the Advocate-General to the Under-Secretary to the Government of India), the *Judicial Commis-*

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sioner refused to allow an appeal to Her Majesty in Council from his judgment (a).

(a) The following was the opinion given by the Advocate-General (Mr. W. Ritchie), and acted upon by the Judicial Commissioner:—

1st. In my opinion it is not competent to the Judicial Commissioner of *Oude* to allow a petition of appeal to Her Majesty in Council from any decision passed by him in any case, civil or criminal, or to suspend execution pending, or to take security regarding any such appeal, unless an Order to that effect shall have been obtained from Her Majesty in Council. But that it is quite competent to the Judicial Committee of the Privy Council to entertain a petition from any person aggrieved by a judgment of the Judicial Commissioner in any civil case of whatever amount, praying for leave to appeal from such judgment, and if such leave be granted, to order the transmission to the Privy Council of transcripts of the proceedings, and to hear and finally dispose of the appeal as fully as in the case of ordinary appeals.

2nd. It is true, as stated by Mr. Campbell, that appeals from the Supreme Courts and *Sudder* Courts of *India*, are regulated by positive Statute, and that there is no Statute, or positive law applicable to appeals from the Judicial Commissioner's decision, which are, for all ordinary purposes and so far as the constitution of his Court by the Governor-General in Council could make them, final. But the Queen in Council possesses by virtue of the Royal Prerogative, a clear appellate jurisdiction over the judgment of all Courts of Justice established in any of the British dominions beyond the seas, and notwithstanding the express statutory rights of appeal from the decisions of the Supreme Courts and the *Sudder* Courts, it has been repeatedly held that, notwithstanding the Statutes which prescribe the time and mode of appealing and the limits in point of amount, the power of the Queen in Council to entertain petitions, for leave to appeal where the conditions imposed by the Statute have not been complied with, remains in full force. Thus it is quite discretionary with the Judicial Committee to admit an appeal from the Supreme or *Sudder* Courts, in cases far below the appealable amount mentioned in the Statutes, and long after the period prescribed by the Statute for filing a petition of appeal in *India* has expired, such petitions have frequently been admitted, and have led to a reversal of the judgment of the Courts below. But these Courts have no power to allow or entertain a petition for leave to appeal, or to stay execution, or to take security

In consequence of this refusal the Petitioners, the original Plaintiffs, presented a petition to Her Majesty in Council, which after setting forth the above facts, and that the matter in dispute exceeded the sum of Rs. 10,000, and that important questions of law were involved in the suit, prayed for special leave to appeal from the judgment of the Court of the Judicial Commissioner, and that that Court might be ordered to

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for the costs of an appeal, except strictly in accordance with the terms of the Statute, or with any Order the Privy Council may make in the particular case.

3rd. Thus the course of any person wishing to appeal from a judgment of the Judicial Committee, will be to send to his agents or legal advisers in *England*, a copy of the judgment, and of so much of the proceedings as may suffice to render his case intelligible, and to show what his grounds of appeal are, and to instruct such agents to apply, by petition, to the Judicial Committee for leave to appeal from the judgment complained of. If the Judicial Committee think fit to grant such leave, it will cause notice to be given to the Judicial Commissioner's Court and to the Respondents in the cause, and all proceedings in the cause must then be translated and transmitted by the Court to *England*, in the mode usual in ordinary appeals from the *Sudder* Court, unless the Privy Council make any special order as to the mode of transmission, or the documents to be sent. Until an order is made by the Privy Council, the Judicial Commissioner will have no jurisdiction to interfere in any way with the appeal, either in transmitting the record, staying execution, or otherwise. There can, however, be no objection. I apprehend, in cases which appear to him of sufficient magnitude to warrant an appeal, to his authenticating the copies or translations of the proceedings about to be sent home by persons contemplating an appeal.

4th. The Privy Council, in determining whether to admit or reject an appeal, will not be restricted to the amount which, in the Supreme and *Sudder* Courts, is the ordinary appealable amount, viz. Rs. 10,000, or to any particular limits of time, but it probably will require a very special case to be made out *prima facie* to its satisfaction, in order to induce it to admit an appeal for a lower amount than Rs. 10,000, or after the expiration of the ordinary time allowed for appealing.

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transmit forthwith the transcript of the proceedings and the evidence in the suit.

Notice of the application for leave to appeal was served on the Secretary of State in Council of *India*.

Mr. *E. J. Lloyd*, Q. C., and Mr. *L. W. Cave*, in support of the petition.

Leave to appeal was refused by the Judicial Commissioner upon the ground that no power has been conferred upon him to allow an appeal. Upon this point they referred to the Parl. papers relating to Province of *Oude*, 1856, p. 257, par. 3 ; p. 267, pars. 44, 45, 46, 49 ; p. 273, pars. 80, 81. There is no positive Statute Law, Regulation, or Order in Council applicable to the admission of appeals from the Court of the Judicial Commissioner to Her Majesty in Council, and our application is for the exercise of the prerogative of the Crown to admit an appeal to prevent a denial of justice. Such power is conferred by Statute, 3rd & 4th *Will. IV.*, c. 41, sec. 4. There is no question as to the appealable value. By the 21st *Geo. III.*, c. 70, sec. 21, the appealable value in civil suits was limited to £5,000, but by the Order in Council of the 10th of *April*, 1838, the appealable value is reduced to Rs. 10,000. The question of law involved is with respect to the operation of the Limitation Act, No. 14, of 1859, to suits brought before the Judicial Commissioner upon bonds, and is most important.

The Lord Justice KNIGHT BRUCE.

Their Lordships think this a fit case for allowing an appeal to Her Majesty in Council. Security for £300 must be lodged for costs (*a*).

(*a*) A similar application was made on the 4th July, 1862, in the case of *Nowab Tajdur Bohoo v. Mirza Jehan*, and leave to appeal granted.

GASPER GREGORY, executor of the
 Will of CATHERINE ARATHOON,
 deceased - - - - - } *Appellant,*

AND

JOHN COCHRANE and VERTANNES }
 TER MARTYROSE - - - - - } *Respondents.**

On appeal from the Supreme Court at Calcutta.

Compromise—Family arrangement between husband and wife—Binding nature—Specific performance of.

Specific performance decreed of an agreement in the English form, made between husband and wife (Armenian Christians), in the nature of a family compromise, respecting the wife's separate property.

In the answer of the wife it was alleged, that property purchased by the husband had been concealed by him from her when she executed the agreement; held, in the circumstances, that that fact if proved was not sufficient to entitle the wife to treat the agreement as a nullity.

Held further that if the property said to have been concealed by the husband had been purchased by him out of moneys belonging to the wife's separate estate, which was clothed with a trust for the children of the marriage, the wife's remedy was, to enforce her own and children's rights by Bill, to compel a settlement of any property improperly withheld by the husband at the date of the execution of the agreement.

THIS was a Bill filed in the Supreme Court at Calcutta, by the Respondent, *Cochrane*, the Official assignee of the estate and effects of one *Arathoon Hyrapret Arathoon*, an Insolvent, against *Catherine Arathoon*, his wife, since deceased, and *Vertannes Ter Martyrose*, her trustee, to compel specific performance of an agreement, in the nature of a family compromise, entered into by her with her husband; and also to set

6th & 8th
 Dec., 1860

* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

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aside an execution under a decree, taken out by her subsequent to such agreement, whereby a house and premises belonging to her husband, was seized ; and further to restrain her from receiving any dividends in respect of a debt proved by her against his estate, as being in contravention of such agreement. The defence was, first, that the agreement was vitiated by fraudulent misrepresentations, concealment, and suppression of facts by her husband, and in particular that at the time of the execution of the deed he was possessed of the house and premises, which fact he had concealed from her ; and, secondly, that the house and premises were fraudulently purchased by the husband, out of the wife's separate estate entrusted to him as her legal guardian, she being a minor at the time of her marriage.

The facts and circumstances of the case are fully stated in the judgment.

Sir *Hugh Cairns*, Q. C., and Mr. *Leith*, appeared for the Appellant ; and.

Mr. *R. Palmer*, Q.C., and Mr. *Maude*, for the Respondents.

The cases of *Attwood v. Small (a)* ; *Dietrichsen v. Cabburn (b)*, were referred to in the argument.

6th Feb.,
1861.

Judgment was delivered by

The Right Hon. Lord KINGSDOWN :

In this case the original appeal was brought by *Catherine Arathoon*, since deceased, against a decree of the Supreme Court at *Calcutta*, on the Equity side, which in effect set aside an execution issued by the original Appellant, and directed a reconveyance of the property seized and sold under it. Mrs. *Arathoon*

(a) 6 Cl. & Fin. 232.

(b) 2 Phill. 52.

having died, the suit has been revived by the present Appellant, who is her personal representative.

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The Respondent, *Cochrane*, is the Official assignee under the Insolvent Act of *Arathoon Hyrapret Arathoon*, the husband of the late Appellant, against whose property the execution in question was issued.

The husband and wife were both Armenian Christians. The marriage took place in the year 1836, the lady at that time being little more than twelve years of age, entitled to a large property, both real and personal, and under the wardship and protection of the Provincial Court of *Dacca*, where she resided.

Previously to the marriage, the future husband, at the instance of an aunt of the wife, signed an *Ikrarnamah*, or agreement, by which provision was made for some settlement of the real and personal estate of the wife. The instrument itself was destroyed by *Arathoon*, after the marriage, in a fit of passion, as he alleges, and the contents of it do not distinctly appear.

Though the marriage took place without the sanction of the Court, the husband was put into possession of the real and personal property of the wife. It is suggested in the Appellant's case, that he was so put into possession as the tutor and guardian of his wife during her minority, and that this was done in conformity with the Armenian law, by which their rights were to be governed. It does not appear that on this occasion the *Ikrarnamah* was brought under the notice of the Court.

There were several children of the marriage, which proved a very unhappy one; there were continual quarrels between the husband and wife; and at last they separated in 1845.

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COCHRANE. In *June*, 1845, Mrs. *Arathoon* brought a suit against her husband, in the *Zillah* Court of *Buckergunge*, in which she stated that she had attained her majority; charged him with ill-treatment and malversation of her property; and prayed that he might be decreed to account for the same, and that she might be put into possession of the whole of her real and personal estate, which had been, as she alleged, entrusted to him as her legal guardian.

The husband, by his answer, insisted that the rights of the parties were to be governed by English law, and that by such law the proprietary right to his wife's real and personal estate had vested in him, and that the instrument which he had executed was not binding upon him.

On the 22nd of *September*, 1845, the suit was heard before the Judge of the *Zillah* Court, who held that the Armenian law was to prevail; that the husband by his conduct had put an end to the state of tutelage in which the Plaintiff was placed; and that her right to the control of her own property, which he stated to be undoubted according to the law, could no longer be withheld. He then declared that the wife was entitled, both by law and by virtue of the agreement entered into before the marriage, to have delivered up to her the whole of her real and personal property, and also to have an account of the bygone rents and profits, subject to a deduction in respect of the sums which the Defendant could prove that he had expended in the maintenance of the family during the time that the wife resided with him. The decree then, as we understand it, though the matter is not very clear, charged the Defendant with the value of all the real and personal property of the wife which

he was shown to have possessed, amounting to Rs. 3,99,510, of which about Rs. 1,86,000 was the value of the real, and the remainder the value of the personal estate. 1860.
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Against this decree there was an appeal to the *Sudder Court at Calcutta*, by which the judgment of the Court below was affirmed on the 17th of *August*, 1848.

It is obvious that this decree involved the consideration of several important questions; whether the Armenian or the English law was to regulate the rights of the parties; and if the Armenian, whether by that law the wife was entitled to the whole of her real and personal estate, as if she were a *feme sole*, exempt from all claims on the part either of her husband or children (a notion not entirely consistent with the fact that the husband had been required before the marriage to execute an agreement renouncing or limiting his right); and, if so, whether the agreement had contained a provision limiting the wife's powers, and securing the property after the death of the parents to the children. If, on the other hand, the rights of the parties were to be regulated by the English law, it would be difficult upon any principles to maintain the decree.

It is insisted by the Appellant that this decree not having been made the subject of appeal within six months to Her Majesty in Council had become final, before the compromise which is the subject of the proceedings now before their Lordships was made, but their Lordships think that what afterwards took place removes any bar which could have been caused by lapse of time.

The decree in question had been made in the

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absence of the children, who were not parties to the suit. There were, at this time, four children, all, of course, by our law, infants. Three were residing with their father, and one, the youngest, with the mother.

On the 2nd of *August*, 1848, a few days after the affirmance of the decree, a bill was filed in the Supreme Court of *Calcutta* in the names of the infant children of Mr. and Mrs. *Arathoon*, by the brother of *Arathoon*, as their next friend, against the father and mother. This Bill stated that by the terms of the agreement, or *Ikrarnamah*, executed by the husband before the marriage, the children were entitled in reversion to the whole real and personal property of the wife; that such agreement had been destroyed by *Arathoon*; that he was totally unable to pay the large debt awarded against him in his wife's suit; that he would be thrown into prison, and the children, who were residing with him, would be left to starve. The Bill prayed that the contents of the agreement might be ascertained, and that the rights of the children might be secured, and that the wife might be restrained by injunction from executing the decree which she had obtained, and by which the whole property in which the children were interested would be swept away.

It is suggested by the Appellant that the object of the children's suit was to defeat, without any appeal, the execution of the decree obtained by the wife, and that the suit was instituted in collusion with the husband, which is very possible. But however this may be, on the institution of the second suit, further proceedings in both suits were stayed, negotiations for an amicable settlement of the disputes between

the husband and wife were entered into, the parties came together again, and cohabited till the 30th of April, 1849.

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It is clear that the time which elapsed during this interval could have no effect in barring *Arathoon's* right of appeal against the decree of the 17th of August, 1848.

On the 30th of April, 1849, the parties again separated. Mrs. *Arathoon* thereupon sued out a writ of execution under the decree of the 17th of August, 1848, and was put into possession of her real estates, in the receipt of the rents and profits of which her husband had been up to this time.

On the 12th of May, 1850, *Arathoon* sued out of the *Supreme Court* a writ of *habeas corpus* against his wife to recover possession of her youngest child, then a little more than three years old, who was living with his mother, and an order was made by the Chief Justice for the delivery of such child to the father.

On the 15th of May, 1849, Mrs. *Arathoon* filed her separate answer in the suit of the children. She denied that the *Ikrarnamah*, signed by the husband contained any provision for the children, or any restriction upon her rights, or that she was at all bound by it if it did. She stated that, under the decree of August, 1848, she had obtained possession of her real estate, but that all her personal estate, and the mesne profits of her real estate, still remained to be recovered from her husband.

To enforce these claims she issued two writs of execution out of the *Zillah Court*, by one of which, dated the 21st of May, 1849, the *Zillah Judge* directed the *Nazir* of the Court to apprehend

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 COCHRANE. *Arathoon*, unless he paid the sum of Rs. 1,15,620. 8a. 10p.; and by the other, dated the 29th of the same month, the Judge directed the same officer to levy of the lands, goods, and chattels of her husband the sum of Rs. 1,16,236. 8a. 9p., besides costs of suit.

How these sums were made out does not very distinctly appear, nor do we understand upon what principle the two writs were issued, one against the person and the other against the property of the husband, for different amounts, nor whether they were for different portions of the same debt, or whether the one was included in the other.

For the purposes of the present appeal, however, these questions are not very material. It is clear that both these writs were founded on the decree of the 17th of *August*, 1848; that the real estate awarded by that decree had been delivered up; and that the sum found due for personal estate, and rents and profits of the real estate, alone remained to be accounted for, subject to an allowance in respect of the sums expended in maintenance.

In this state of the litigation in this unfortunate family, negotiations were entered into for the settlement of all their disputes. Agents and friends were employed on both sides; and at length, after a long interval of discussion, the terms were agreed upon, and were embodied in a deed in the English form, dated the 17th of *July*, 1849, which was made between Mrs. *Arathoon* of the first part, her husband of the second part, the next friend of the infants in their suit of the third part, and a formal party of the fourth part.

This deed contained a very full recital of the

disputes subsisting between the parties, and a statement of the personal property of the wife disposed of by the husband, or remaining in his hands, by which it appeared that Rs. 70,000, had been laid out in the purchase of a real estate in the *Old China Bazar* at *Calcutta* in his own name, and that Government promissory notes to the amount of Rs. 21,000, were still in his hands; and it then provided that all the suits and litigation should be terminated upon the terms subsequently stated. These were, in effect, that upon the children's suit being compromised by order of the Court, Mrs. *Arathoon* would enter up satisfaction on the judgments which she had obtained against her husband, and in the mean time suspend their execution; that the promissory notes in the hands of the husband should be made over to her; that the property situate in *Calcutta* should be vested in trustees, to be approved of by the Master, upon trust to pay the rents to *Arathoon*, he maintaining three of the children, who were to remain with him, and after his death to pay the rents to the wife, if she survived, and after the death of the husband and wife, in trust for all the children, and the issue of such as should die. It was then provided that one of the children already born, and the child of which the wife was then pregnant, should reside with her, and that the husband and wife should, in future, live separate, and a deed of separation and mutual releases were to be executed. The next friend of the infants was to obtain a reference to the Master, to inquire whether it would be for their benefit that their suit should be compromised on these terms, and the wife was to pay her own costs, and also the costs of the infant Plaintiffs in their suit.

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COCHRANE. An order was accordingly obtained in the infants' suit for a reference to the Master, as provided by the agreement. The Master seems to have doubted whether he could sanction on their behalf, the proposed compromise, and he required, before he did so, that *Arathoon* should put in his answer. By his answer *Arathoon* admitted that the *Ikrarnamah* was to the effect stated in the Bill, and that in a fit of passion he had destroyed it; he said that at the time of the marriage he was a person of independent, though small, property, and he admitted that he was wholly unable to pay the large amount for which execution had been issued against him, or adequately to maintain the children.

The Master ultimately approved the compromise. His report was confirmed by the Court, which, on the 18th of *February*, 1850, made an order directing the compromise, as regarded the children, to be carried into effect, and a proper deed to be executed for conveying the estate in the *Old China Bazar* to trustees, upon the trusts proposed by the agreement.

A deed was accordingly prepared and executed, bearing date the 25th of *December*, 1850, by which this estate was conveyed to two gentlemen of the names of *Bagram* and *Voss*. The promissory notes of the Government described in the deed of compromise, were transferred to Mrs. *Arathoon*. She remained in possession of her real estate; she lived separate from her husband without any interference by him, and she had the custody of the child who was to be retained by her, and also of that which was born subsequently to the agreement, and the suit of the children was put an end to. In short, she received the full benefit of every stipulation contained

in her favour in the deed of compromise, which, as regarded her interests, was in substance fully and completely executed.

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She did not enter up, and probably was not called upon to enter up, satisfaction on the judgment which she had obtained against her husband, and on which writs of execution had been issued; this was a mere formal act.

The amount of the Government promissory notes which had been handed over to her, and the value of the *Old China Bazar* estate, now settled on the children, were included in the sums for which the executions had been issued, and by the transfer and conveyance under the terms of the compromise, these judgments had been actually satisfied.

Availing herself, however, of the circumstance that satisfaction had not been entered up, Mrs. *Arathoon*, on the 21st of *January*, 1853, while she was enjoying the benefits secured to her by the compromise, adopted the extraordinary proceeding of putting in force one of the writs of execution which had been thus satisfied, and seizing under it a house in *Free School Street, Calcutta*, as property belonging to her husband, and liable to her execution. The husband's interest in this house was sold by the Sheriff, and the house was purchased by Mrs. *Arathoon*, and in *May*, 1854, was conveyed to a trustee for her.

Arathoon hereupon took the benefit of the Insolvent Act. The Respondent, *Cochrane*, was appointed assignee, and, in the month of *September*, 1855, he filed against the late Appellant and the trustee for her, to whom the house in *Free School Street* had been conveyed, the Bill out of which the present appeal arises. This Bill insisted on the terms of the compromise, and

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COCHRANE. prayed that it might be declared binding upon the Defendant, Mrs. *Arathoon*, and that she might be decreed to enter up satisfaction on the decree or judgment in her suit, and that the house in *Free School Street* might be conveyed to the Plaintiff, as assignee of *Arathoon*.

The Defendant, by her answer, admitted the agreement, but alleged that she had been induced to enter into it by the positive statement of her husband, that except the *Old China Bazar* estate, he was possessed of no property whatever; while, in fact, he was at that time possessed of the house in *Free School Street*, which had been conveyed at the same time with the *Old China Bazar* estate to the same trustees; that the fact of such right of her husband to this property had been fraudulently concealed from her at the time of the compromise; and she insisted that, under the circumstances, she was well justified in seizing the *Free School Street* house under her writ of execution, and in refusing to enter up satisfaction on her judgment. She appended to her answer the copy of a notice which she had received from the trustees under the deed of the 25th of *December*, 1850, already referred to, in which it was stated that, by a deed of the same date, the house in *Free School Street* had been conveyed to them by *Arathoon* upon certain trusts for the benefit of himself, his wife, and children, which do not appear to differ very materially from those to which the *Old China Bazar* estate was subject.

Evidence was gone into, and at the hearing the Court was of opinion, that the defence was not made out in point of fact, and that if it had been it could not have been sustained in point of law.

The decree ordered satisfaction to be entered on the judgment, and the estate in question to be conveyed to the Plaintiff, subject to any claims which might be established against it by the Trustees under the conveyance in trust, alleged to have been executed by *Arathoon*.

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Their Lordships agree with the Court below in their opinions on all the points which they had to consider.

There is no evidence that Mrs. *Arathoon* in entering into the agreement of compromise acted under the belief that her husband was possessed of no real estate beyond that in the *Old China Bazar*. If she really was acting upon that assumption it was necessary, in order to make the fact of any importance, that it should have been communicated to her husband; for otherwise there could be nothing to require him to make any discovery of his property, or to subject him to any imputation of bad faith for omitting to do so. But no such communication appears ever to have been made, and there is no sufficient proof that *Arathoon* ever made, or was ever called upon to make, any disclosure as to the amount or particulars of his property, except as to purchases made with the money of his wife. There was no statement in his answer in the suit of the children that he had no real property except the *Old China Bazar* estate; and he had, and his wife could not be ignorant that he had, a share in a house in *Calcutta* which had belonged to his mother.

The grounds of the compromise are fully stated in the recitals of the deed. It is not pretended that such recitals are inaccurate, and from the beginning to the end there is no trace of the alleged statement

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of the husband, nor of the pretence now set up that his state of destitution was any consideration for the wife entering into the compromise. He had, indeed, stated, what was equally true, whether the *Free School Street* house belonged to him or not, that he was unable to satisfy the judgment obtained by his wife. This lady received ample consideration for abandoning her writs of execution. She secured a separation from her husband. She got rid of any claim by him and by her children to any part of her real or personal estate, except the property in the *Old China Bazar*. She prevented any appeal against the decree which had been pronounced in her favour in the *Sudder Court*, and she secured the custody of two of her children.

That the inquiry as to *Arathoon's* property was confined to purchases made with the money of his wife, is clear from what took place in the month of *March, 1850*.

At that time Mr. *Templeton*, the solicitor of Mrs. *Arathoon*, supposed that *Arathoon* was the owner of the house in *Free School Street*; and he insisted that this house had been purchased with Mrs. *Arathoon's* money, and ought to be included in the settlement on the children. He wrote to this effect to Mr. *Denman*, the solicitor acting for the infants; and it is clear from the evidence, that both Mr. *Denman* and Mr. *Templeton* considered that the principle of the arrangement for the compromise was that all real estate which had been purchased with Mrs. *Arathoon's* money should be the subject of the settlement. This is perfectly consistent with the recital in the deed, and with the commission of a fraud by *Arathoon* in misrepresenting or concealing the fact that such pur-

chase had been so made. But there is no trace of ^{1860.} any claim being made on behalf of Mrs. *Arathoon* on ^{GREGORY} the property at this time, supposing it to be the ^{2.} ^{COCHRANE.} independent property of the husband, not purchased with her money, nor is there any complaint of misrepresentation or concealment by him, if that was the case. There was full opportunity of inquiring into the circumstances between the month of *March*, when the claim in question was brought forward, and the subsequent month of *December*, when the compromise was carried into effect; and the lady at that time acquiesced in the arrangement previously made, and accepted the benefits thereby given to her in satisfaction of her claims under the judgment.

On the whole, their Lordships are satisfied that no such fraud as is the foundation of the defence in this case has been established against the husband. If it had been it could not have been used as a defence in this suit, which is not one for the specific performance of an agreement remaining *in fieri*, and in which a Court of Equity has a discretionary power to grant or to refuse relief beyond the law. It is a Bill to set aside an act done in plain violation of an agreement which, in all its material parts, had been executed, and all the benefits of which the party violating it retained on her part, while as against the other party she treated it as a nullity.

There may be reason to suspect from the evidence that the house in *Free School Street* was purchased with the wife's money, and that if so purchased it ought to have been included in the settlement, and that it was kept out of the settlement by the fraudulent misrepresentations or concealment of the hus-

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COCHRANE. band. But on that hypothesis the proceedings of the wife are equally irregular. If the house was bound by a trust for the children it could not be subject to a writ of execution for her private debts. Her proper course would have been not to treat the agreement as a nullity, but to act upon it, and enforce it by a Bill to compel a settlement of the property which had been improperly withheld.

In truth, however, it appears that a settlement had been made of the house on trusts pretty much the same with those applicable to the property in the *Old China Bazar*.

On the whole, their Lordships agree both with the decision in the Court below, and with the reasons assigned for it in the extremely able judgment of the Chief Justice, and they must advise Her Majesty to affirm the decree complained of, with costs.

LUCKMEE CHUND, and others - - - Appellants,
 AND
 ZORAWUR MULL, and others - - - Respondents.*

*On appeal from the Sudder Dewanny Adawlut at
 Agra in the North-Western Provinces.*

Heard ex-parte.

Jurisdiction—Place of suing—Contract of partnership between firm in British India and firm in Native State entered into in Native State—Central place of business in British India—Books kept and balance struck in British India—Partnership ending in loss—Suit by British Indian firm against Native State firm for debt due on balance struck—Forum.

A contract was entered into at Rutlam, in the independent State of Malwa, between the firm of L., who resided and carried on business at Muttra, within the jurisdiction of the Zillah Court at Agra, and the firm of Z., carrying on business at Rutlam, and elsewhere; for the establishment of a co-partnership for the purchase and sale of opium. The co-partnership business was carried on principally at Muttra, and the business was conducted there by means of the capital advanced in the concern, by the firm of L., in which place the partnership books were kept. At the close of the partnership, which was attended with loss, a balance was struck at Muttra, which showed a debt due by the firm of Z. to the firm of L. In an action brought by the firm of L. against the firm of Z. in the Zillah Court of Agra, for recovery of the amount of this balance, it was pleaded by Z. that as the contract was made at Rutlam, where the firm resided, the Zillah Court at Agra had, by Ben. Reg. II. of 1803, no jurisdiction to entertain the action, which objection the Zillah Court allowed, and afterwards the Sudder Court at Agra, on appeal, sustained.

Upon appeal such decision was reversed by the Judicial Committee

THE sole question in this appeal was, whether the Zillah Court at Agra had jurisdiction under the provisions of Ben. Reg. II. of 1803 to entertain the suit.

3rd Dec.,
 1860.

* Present: Members of the Judicial Committee,—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

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on the ground, that the cause of action arose in *Muttra*, and was, by *Ben. Reg. II.*, of 1803, within the jurisdiction of the *Zillah Court of Agra*.

First, because *Muttra* was the established place of business of the co-partnership, where the books were kept for the purpose of the partners ascertaining the state of the transactions between them, and

Secondly, as it was there that the balance was struck, and payment of the balance due.

The case was not heard upon its merits, but on a preliminary point, whether the *Zillah Court at Agra* had jurisdiction to hear and determine the suit under the provisions of *Ben. Reg. II.* 1803, secs. 3, 4, 5 (a). The Appellants were non-suited by the *Zillah Court*, on the ground of want of jurisdiction, and that Court's decree was affirmed on appeal by the *Sudder Dewanny Adawlut*.

The facts of the case were these :—

The Appellants resided at *Muttra*, within the ambit of the *Zillah Court of Agra's* jurisdiction, carrying on a banking and mercantile business by themselves

(a) These sections enact as follows:—

“3. The jurisdiction of the *Zillah Courts* shall extend to all civil suits arising within the Districts and places which are, or shall be, included in the *Zillahs* in which they are respectively established.

“4. All natives, and other persons not British subjects, are hereby declared to be amenable to the jurisdiction of the *Zillah* and City Courts.

“5. The *Zillah Courts* are empowered to take cognizance of all suits and complaints respecting the succession or right to real or personal property, land rents, revenues, debts, accounts, contracts, partnerships, marriage, caste, claims to damages for injuries, and generally, of all suits and complaints of a civil nature, in which the Defendant may come within any of the descriptions of persons mentioned in section 4; provided that the landed or other real property, to which the suit or complaint may relate, shall be situated, or in all other cases the cause of action shall have arisen, or the Defendant at the time when the suit may be commenced shall reside, as a fixed inhabitant, within the limits of the *Zillah* over which their jurisdiction may extend.”

and by *Gomastahs*, or agents, in houses of business established in the principal cities throughout *India*. One of these houses established at *Muttra*, was carried on by the Appellants. Another was established at *Rutlam*, in the independent State of *Malwa*, and the business carried on by agents only. The Respondents were also Bankers and merchants, carrying on business at *Rutlam*.

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The dealings between the parties to this appeal began in the month of *March*, 1846, when one *Salig Ram* went to *Muttra*, and had an interview with the Appellants, at their house of business there, to whom he was previously known, at one time as the partner, and at another as the *Gomastah* of the Respondents. At this interview, *Salig Ram* stated that he had been commissioned by the Respondents to effect a partnership between them and the Appellants in the purchase and sale of opium.

The terms and conditions of the partnership were, after some delay, finally agreed to at *Muttra* by the Appellants on the one part, and by *Salig Ram*, acting on behalf of the Respondents on the other part. The authority of *Salig Ram*, as agent, was afterwards confirmed by the Respondents, both verbally and by a letter sent by them to the Appellants. That letter was as follows:—

“Dear brethren, brother *Radhakishen*, and brother *Rughonath Doss*, accept the salutations of the *Rutlam Walas* and *Dan Mull*, and *Indur Mull*, and know that the *Rutlam Walas* assigned over the opium business to brother *Salig Ram*. The transactions conducted by *Salig Ram*, wherein he made purchases at *Muphul*, *Bathama*, *Buja*,

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Rutlam, Burnugur, and Mundisore, you will be pleased to close. In future your and our joint transactions you will be pleased to enter into with the consent of both parties, opening a separate set of books. The profit or loss shown by these will consist of 21 shares, that is to say, one share shall belong to God, $12\frac{1}{2}$ shares shall belong to yourselves, and $7\frac{1}{2}$ shares shall be our property. It is agreed that this shall be the distribution of the 21 shares. The former loss of three and a quarter lacs of rupees brother *Salig Ram* has taken upon himself, and until your loss is reimbursed the share shall continue as above stated. When your loss shall have been recovered, then the shares shall be divided half and half alike. In these transactions your capital at *Muttra* shall be embarked, and interest at the rate of 6 annas per cent. per mensem will be allowed. *Salig Ram* will conduct the business, and he will act with the consent of both parties. *Salig Ram* will discharge his duties towards both parties conscientiously."

It appeared that separate sets of books were opened, and kept at *Muttra*, where the co-partnership business was carried on at the house of business there of the Appellants. The moneys used as the capital in the co-partnership dealings were, also, supplied by the Appellants at *Muttra*, and debited in the books kept there, to the amount of Rs. 57,31,865. *Salig Ram* alone expending and employing the same in the purchase of opium for the copartnership. The opium was sold at *Bombay* and in *China*, and the account sales and proceeds were all remitted to the Appellants' house at *Muttra*, where the business and accounts

of the co-partnership were kept by the Appellants, and where the books containing those accounts were retained.

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It further appeared that losses were sustained in the business, and when the co-partnership dealings and accounts were closed, a balance was struck at *Muttra*, against the co-partnership, amounting to Rs. 22,67,962.

The Appellants informed the Respondents of the state of the co-partnership accounts, and the balance at debit, and requested them to come to a settlement and pay their share of the balance.

The Respondents having neglected to pay the same, an action was brought by the Appellants in the *Zillah* Court of *Agra*, against them to recover their share of the balance, amounting to the sum of Rs. 10,75,156. 1a., including interest as well as the principal. Amongst other things set forth in the plaint, the terms and conditions of the co-partnership verbally agreed to at *Muttra*, by the Respondents through *Salig Ram*, were stated, and a letter received by the Appellants from the Respondents was set out, which was in these terms:—"The Defendants (the Respondents), according to mercantile custom, addressed a letter to the house at *Rutlam*, under date the 2nd *Katik Soodee Sumbut*, 1903, containing all the conditions in respect to the partnership which *Salig Ram* had previously proposed and settled with the Plaintiffs (the Appellants), which letter, along with other letters of the Defendants, the Plaintiffs now hold."

The answer of the Respondents, among other things, stated that they were residents of *Oodeypore*

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Kotah Jehsulmore and of *Rutlam*, places situated in a Foreign territory, and they raised two objections to the action; first, that the action was not entitled to be heard in the Company's Courts, and especially in the *Agra* Court; and, secondly, as to the incorrectness of the claim itself. As to the first objection, it was alleged, that *Salig Ram* was neither the agent nor partner of the Respondents, nor did they depute him, but that he was the agent and confidant of the Appellants; and secondly, that the Respondents were not residents in the British territory, nor did the transactions and accounts declared to have taken place by the Appellants occur in a British territory. That, according to Reg. II. 1803, there were two points which defined the District in which a suit could be instituted. One of them was to the effect, that it should be instituted in the place where the transactions occurred with Defendants; and the other, that it should be presented in the District of which, at the time of presenting the complaint, the Defendants were permanent residents; and they insisted that the institution of the suit in the Company's Court was a violation of the Treaties existing between the British Government and Native States, an account of which was given in the letter addressed by the agent to the Judge of the *Zillah*, dated the 4th *May*, 1850, and which was filed with the *misl*; and the Appellants relied upon the letter, dated 2nd *Katik Soodee Sumbut*, 1903, received from the house of *Rutlam*, situate in a Native State, in connection with the partnership, the cause of action in the present suit—when, according to the Appellants' own showing, that letter related to *Rutlam*, and could not,

therefore, be inquired into by the *Zillah* Court at *Agra*.

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By the replication it was insisted that the Respondents were residents and had property, both moveable and immoveable, within the territories of the East India Company; but that being mercantile men they occasionally travelled to other places; and it was further insisted that suits might be heard against those who were residents in a Foreign territory, under the rule laid down in section 36 of the Despatch of the Honourable Court of Directors, dated 27th of *May*, 1835: and, that the Treaties alluded to in the answer were not applicable to this case. The replication also stated that the letter alluded to in the answer, was not the ground of action, but only a verification of the conditions of the co-partnership which had been concluded previously at *Muttra*, through *Salig Ram*, the authorized agent of the Respondents; and that he had been for a long time a partner, and subsequently the *Gomastah* of the Respondents.

The *Zillah* Court of *Agra*, directed, among others, the following issues to be tried. First, whether the Court was legally competent to hear the suit; and secondly, whether any defect existed in the claim which rendered the Plaintiffs liable to be non-suited. The issues of facts arising from the pleadings were stated to be,—First, whether the partnership contract in the opium speculation was actually entered into as stated by the Plaintiffs; secondly, if the contract was proved, whether the amount claimed was due; and thirdly, whether *Salig Ram* was the accredited agent and partner of the Defendants, and entered into the terms of the contract on their behalf.

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Witnesses were examined on the part of the Appellants. It was proved that the alleged co-partnership was effected through *Salig Ram* at *Muttra*, as the agent of the Respondents; and the subsequent verbal confirmation of his acts by one of the Respondents, *Bhubootee Sing*. The letter written by him in the name of his firm to the Appellants' firm was also proved, and that the accounts were kept, and payments made, and the proceeds of the opium received at *Muttra* on account of the co-partnership. No witnesses were examined by the Respondents.

On the 24th of *July*, 1851, judgment was pronounced by Mr. *Henry Byng Harington*, the Officiating Judge of the *Zillah* Court of *Agra*. By that judgment the Appellants were non-suited, on the ground that they had failed to establish that the Respondents were subject to the jurisdiction of the Court in respect to the claim, either on the ground of the cause of action having arisen, or on the Respondents being constructively or otherwise residents, at the date of the institution of the suit, within the limits of the Court's jurisdiction.

The Appellants appealed from this judgment to the *Sudder Dewanny Adawlut* of the North-Western Provinces at *Agra*.

The appeal was heard before Messrs. *Begbie*, *Browne*, and *Harington*, the Judges of that Court, and a decree was pronounced on the 7th of *June*, 1852. The material parts of this decree were as follows:—
 “Apart from the facts involved in it, the question of jurisdiction itself lies within a narrow compass. It is not denied that a party entering into a partnership engagement with a firm in the British territory,

and carrying on transactions elsewhere with the funds advanced by it, is liable to the jurisdiction of the tribunal of the locality where the cause of action, or in other words the partnership contract arose; nor, on the other hand, is it contended that a party, resident in the British territory, who embarks his capital in trading speculations with residents of a Foreign territory, on a contract entered into and to be executed within that territory, has any power by law to summon the other contracting party before his own Courts. The Appellants, in fact, throw the grounds of their suit on the contract which *Salig Ram* is said to have concluded with them on the part of the Respondents within the *Agra* jurisdiction; and although the cause of action has not been set forth in the plaint with the distinctness required by law, it may be gathered from the pleadings at large with sufficient clearness to constitute the determination of this fact; the test of the jurisdiction. On the pleadings, the proof of *Salig Ram* having been the accredited agent of Respondents, and of the contract alleged, must be first considered, and as these must be drawn from the oral and documentary evidence, and from general probabilities, the Court consider the first objection raised by the Appellants in their reasons to be of no weight, no more of the facts of the case having been entered into by the Court below than were necessary to enable it to arrive at some certain conclusion on the preliminary issue. The Court first note the ambiguous character in which *Salig Ram* is said to have appeared at *Muttra*, and the want of any satisfactory proof of the real position held by him in relation to the Defendants in their general business.

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In the pleadings he is stated to have been both partner and agent. In the oral evidence the witnesses adduced by the Appellants depose on their knowledge, derived from common and credible rumour, that he was the confidential friend and agent of the Defendants' house of business, that he had also a share of his own in several houses of business in *Malwa*, and that the Defendants, on being questioned, had themselves stated that he was one of them. But in the petition presented by *Salig Ram* himself to the Resident of *Indore*, he represents that his partnership with Defendants had been dissolved some time before, and that a '*Farigh-kuttee*,' or deed of release, had been exchanged, whereby it was agreed that a yearly allowance of Rs. 6,000, should be paid to him in satisfaction of all claims. The petition was presented for the purpose of obtaining the aid of the Residency authorities in the payment of the allowance; and although the presenter of it had an obvious motive in exaggerating his services, no mention is made in it of any direct and continued connection with Defendants, in the way of situation or service, subsequently to the dissolution, or of any power having been committed to him, either as an agent or friend, to open the negotiation referred to therein. This evidence is, in the opinion of the Court, wholly insufficient to prove that *Salig Ram* had established himself as an accredited agent in the general business of the Defendants' firm so as to dispense with the formality of credentials, and the Appellants do not affirm that any special letter of introduction was brought by him authorizing his proposals. It is, on the contrary, abundantly clear

from the circumstances, no less than from the ambiguities and contradictions above noticed, that the Appellants were quite at a loss in what manner they were to receive the communications of *Salig Ram*; and that after deputing a confidential servant for the purpose of observing his proceedings, and instructing their correspondents at the branch firm at *Rutlam* to make full inquiries on the subject, they took no further steps in the matter until the receipt of the letter which had been transmitted to them by the *Rutlam* house. The correctness or otherwise of the inference drawn by the Judge from the question proposed to the witness, *Puna Lal*, appears to the Court to be of no material consequence either way. The facts still remain, that *Salig Ram*, after his lengthened stay at *Muttra*, did not repair, on his return; to his alleged principals; that nearly six months, according to the Appellants' own showing, elapsed between the arrival of *Salig Ram* at *Muttra* and the date of the letter, which period had been spent in inquiries, and that the books were not opened in the interim. The circumstances are strongly opposed to the statements put forth by the Appellants, and afford no indications of the tender and acceptance of formal proposals regarding the partnership, and of the postponement of the opening of the books until the terms of the contract had been ratified by the principals of the Defendants' firm, as asserted by them. There is, it is true, some oral evidence to the particulars of the negotiation between *Salig Ram* and the Appellants at *Muttra*, but no value can be allowed it when weighed against the opposite presumptions, and the Court view it on other grounds with much distrust. Negotiations of so delicate and

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important a character between large and opulent firms are not usually conducted in the presence of witnesses, and proof of such transactions is not sought for by the Courts, or by the commercial usages recognized by the Courts in oral testimony. It is at the same time remarkable, considering the advantages in point of jurisdiction which the completion of the contract at *Muttra* would have conferred, that the Appellants, who are thoroughly versed in the practice of our Courts, should have neglected to guard their own interests, by securing some unquestionable documentary proof of the fact, in aid of their present allegations. The letter remains to be considered, a translation of which is to be found in the decision appealed from. Each party placing a different construction on this document, the Appellants urging that its terms convey a ratification of the previously-completed contract of which it was merely the evidence, whilst, according to the statements of the Defendants, and under the view of its purport taken by the Judge, it formed the original and basis of the partnership agreement, and constituted the real cause of action. The letter in question refers to some past opium transactions between the parties, which had been conducted by *Salig Ram*, and under the distribution of the shares in the new venture the writers agree that *Salig Ram* should work off the loss of three and a quarter lacs incurred by the *Rutlam* house in the former transactions from the five shares in excess, which are assigned to the house for that purpose, the business being conducted by *Salig Ram* as before. There is also a mention of the capital of the *Muttra* house being embarked in the speculation,

but beyond this there is nothing in the letter to indicate a foregone contract in the matter with the head firm at *Muttra*, or to warrant any presumption of the transfer of the locality of the agreement from *Rutlam*. It is addressed by the Defendants' house at *Rutlam* to the Appellants' house at the same place, and the plain terms of the document, in the opinion of the Court, afford no grounds for an inference that the contracting parties were other than the two houses there. It would, in fact, appear from its tenor as if the Defendants had endeavoured to guard against any other possible interpretation of their meaning at the time of writing. The Court, therefore, consider that the purport of the document assists the conclusions from the other evidence; and, as there is no evidence that the Defendants acknowledged afterwards, by act or letter, the existence of any partnership transactions with the *Muttra* house direct during the three years of their alleged continuance, they hold that the *Agra* Court has no jurisdiction in adjudicating between the parties, and dismiss the appeal."

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The present appeal was from this decree.

As the Respondents did not put in an appearance the appeal was set down for hearing *ex-parte*.

Mr. *Leith*, for the Appellants.

This decree cannot be maintained. It is founded upon an entire misconception of the effect of the co-partnership agreement. The only question that the Court below had to consider was, whether the contract between the parties, or the cause of action arising out of the contract, occurred within the juris-

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diction of the *Zillah* Court of *Agra*. First. By the terms and conditions of the contract between the parties the carrying on of the co-partnership business was to take place, and, as a fact, did take place at *Muttra*; the *locus contractus*, was, therefore, at *Muttra*. There the partnership accounts were kept, in respect of which the liability of the Respondents arose; moreover, the balance was there ascertained and taken, and it was for the recovery of the balance so struck there that the present action was brought, the breach being for non-payment there. Now, the Respondents were either actually or constructively subject to the jurisdiction of the *Zillah* Court at *Agra*, for first, the action arose within the jurisdiction of that Court within the meaning of sec. 3 of *Ben. Reg. II.* of 1803; and, secondly, the cause of action arose within that jurisdiction by sec. 5 of that Regulation. It has been so decided by the Courts in India, *Wilayat Ulee Khan v. Mirza Ubdoollah Shah* (a), *Chowdhree Juggernath v. Bunseedhur* (b), *In re Sunken Mahter* (c). The general rule upon this point is conclusively laid down by *Story*. "Conflict of Laws." (Edit. 1841.) In sec. 282, when treating of the conflict of jurisdiction, he says, that "if no place of performance is stated, or the contract may be indifferently performed anywhere, it ought to be referred to the *lex loci contractus*." So *Burge*, "Comms. on For. & Col. Law," vol. iii. p. 752, observes, that "when the parties do not reside in the place where the contract is made, and it is effected by agents or letters, the place in

(a) 11 Sud. Dew. Rep. N. W. P. 646.

(b) 8 Sud. Dew. Rep. N. W. P. 159.

(c) 10 Ben. Sud. Dew. Rep. 280.

which the final assent is given by the party to whom the proposition was made, is that in which the contract is considered to have been made." The authorities fully sustain this proposition. *Albion Fire and Life Assurance Co. v. Mills* (a), *Whiston v. Stodden* (b), *Cox v. The United States* (c), *Robinson v. Bland* (d).

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Secondly. It is a principle well recognized that if a contract is made by an agent without orders, and the correspondent ratifies it, such contract is binding on the principal, *Boyle v. Zacharie* (e). Here *Salig Ram* had authority previously to bind the Respondents by the co-partnership agreement entered into by him at *Muttra* on their behalf; but, even if he had not that authority, then the subsequent adoption and ratification of his acts by the letter of one of the Respondents gave the same effect to the agreement as if he had previously obtained such authority from them.

The Right Hon. Lord CHELMSFORD:

The proceedings of the Plaintiffs in this cause have not been particularly expeditious, as we are now dealing with a decree of the *Sudder* Court made in the month of *June*, 1852, affirming a decree of the *Zillah* Court, by which the Plaintiffs' suit was dismissed on the ground of want of jurisdiction.

The only question which their Lordships have to determine is, whether the contract which was entered into between the parties, or the cause of action arising

(a) 3 Will. & Shaw, Sc. Reps. 233. S. C. on appeal, 1 Dow. & Cl. 342.

(b) 8 Martin's Amer. Reps. 95.

(c) 6 Peters' Amer. Reps. 172.

(d) 2 Burr. 1079.

(e) 6 Peters' Amer. Reps. 644.

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out of that contract, occurred within the jurisdiction of the *Zillah Court of Agra*.

If this question had depended upon the authority of *Salig Ram* to enter into any contract by which he could bind the Respondents, probably their Lordships would have determined that there was no evidence whatever to show that he possessed any such authority, because in the petition which he had presented to the Resident of *Indore*, and which was put in by the Appellants themselves and made part of their evidence, *Salig Ram* distinctly states that no partnership existed between him and the Respondents; and if he were merely the *Gomastah* of the Respondents, he could have no power in that character alone, to bind them to any such partnership as it is alleged he entered into. But whether this is so, or not, it is quite clear that the letter which was put in evidence by the Appellants, and which was written by one of the Respondents, amounts either to a contract of partnership or to a ratification of what had been previously done by *Salig Ram*. Now, although that contract was entered into at *Rutlam*, yet it was for the establishment of a partnership which was to be carried on principally at *Muttra*, where all the transactions were to be conducted by means of the capital embarked in the concern at that place.

The partnership having been thus established, advances were made from time to time, according to the terms of that partnership. Money was transmitted to *Indore* and other places. So far as those advances were from time to time made, though they did not constitute any debt upon which there would

be any cause of action arising to the Appellants, yet they were made in pursuance of the partnership contract, and if the speculation had been a successful one, the profits would, of course, have gone to countervail the advances. But it turns out that the undertaking was unprofitable, and that losses were incurred, and the claim which is now made being the cause of action alleged by the Appellants, is for a balance of ten *lacs* of rupees arising out of these partnership transactions.

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Now, where can it be said that the cause of action, supposing it exists for that balance, properly arose? *Muttra* was, undoubtedly, the central place of business ; at *Muttra* the partnership books were kept ; at *Muttra* the partners would have recourse to those books for the purpose of ascertaining the state of the transactions between them ; and if, in the result, a balance was due to the Appellants, *Muttra* would be the place where the payment of that balance would have to be made. It, therefore, appears clear to their Lordships that if there is a cause of action arising out of the balance resulting from these partnership transactions, that cause of action arose at *Muttra*.

Under these circumstances, it is quite unnecessary for their Lordships to make any further observations upon the case ; indeed, they are anxious not to touch, in the slightest degree, upon the merits of the question between these parties. They must assume, of course, but merely for the purpose of the determination of this question, that there is a balance due to the Appellants arising out of the partnership that was established.

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Their Lordships are, therefore, of opinion that both these decrees must be set aside, but, as there are two decrees in favour of the Respondents, their Lordships are of opinion that this should be without costs.

DOORGAPERSAUD ROY CHOWDRY - - - Appellant,

AND

TARAPERSAUD ROY CHOWDRY - - - Respondent.*

On appeal from the Sudder Dewanny Adawlut at Calcutta.

Bengal Limitation Regulation (III of 1793), S. 14—Construction—Applicability—Ineffectual proceedings in Court—If sufficient to save limitation—Compromise decree—Construction—Decree for possession only—Mesne profits—Power of Court to allow in execution proceedings.

A suit was instituted in 1827, by *A.* against *B.*, to recover a moiety of real estate in the possession of *B.* In the year 1829 the suit was compromised and a partition agreed upon. The *Razenamah*, or deed of compromise, provided that, in the event of either of the parties not agreeing to act, according to the terms of the compromise, the Court was to enforce the same. *B.* refused to carry out the agreement, and *A.* applied to the Court to enforce the compromise; the *Sudder Court* in 1832 confirmed the agreement, and ordered possession to be given to *A.*, directing the suit to be struck off the file. No directions were given by the order of the Court respecting the mesne profits. In the same year *A.* presented a petition to the *Sudder Court*, founded on the order for possession, for *Wasilat* or mesne profits of his share of the real estate. This petition came before a single Judge of the *Sudder Court*, who made an order awarding *Wasilat* from the date of the decision of the Court to the date of possession. This order was appealed from, and in the year 1853, the *Sudder Court* held that the order of a single Judge decreeing *Wasilat* was *ultra vires*. In consequence of this decision, *A.*

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THIS suit was brought for the recovery of *Wasilat*, or mesne profits of real estate, and the sole question

* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

brought a regular suit against *B.* for *Wasilat*. In defence it was pleaded that the Plaintiff's claim was barred by *Ben. Reg. III.* of 1793, sec. 14, as the mesne profits claimed accrued beyond twelve years from the date of the institution of the suit. The *Sudder* Court decided, that, in the circumstances, the Regulation did not apply. Such decree affirmed, on appeal, by the Judicial Committee of the Privy Council by reason—

First, that the cause of action did not arise upon the suit instituted in 1827, or upon the agreement to compromise, and

Secondly, that the conduct and acts of *A.*, from the date of the order striking the cause off the file of the *Sudder* Court, in endeavouring to recover the *Wasilat* showed an intention to carry out the compromise, and the proceedings before the Court to recover the same took the case out of the operation of *Ben. Reg. III.* of 1793, sec. 14.

A single Judge of the *Sudder* Court is not competent to make a supplemental order for *Wasilat*, upon a decretal order of the Court merely decreeing possession.

raised by the appeal was, whether the Respondent was entitled to *Wasilat* from the period of twelve years next before the institution of the suit, according to sec. 14 of *Ben. Reg. III.*, of 1793, or, whether he was entitled to go back to the year 1829, the date at which by certain deeds of *Razenamah* and *Safeenamah*, and an order of Court made thereon, his title to the moiety of the property became perfected.

The facts are fully stated in the judgment.

The appeal was argued by

Mr. *R. Palmer*, Q. C., Mr. *Leith*, and Mr. *Maude*,
for the Appellant, and

Mr. *W. Field*, for the Respondent.

The authorities cited upon the question of the limitations of the suit, under *Ben. Reg. III.*, of 1793, sec. 14, and *Ben. II.*, of 1805, secs. 1 and 3, cl. 3, to the *wasilat*, were *Troup and Dyce Sombre v. The East India Company* (a), *Rajah Enayet Hossein v. Sayud Ahmed Reza* (b), *Prannath Roy Chowdry v. Rookea*

(a) 7 Moore's Ind. App. Cases. 104.

(b) *Ib.* 238.

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*Begum (a), Sheoraj Singh v. Munsookh Rai (b),
Pudarut Dap v. Futteh Ali (c).*

Their Lordships' judgment was delivered by

The Right Hon. Lord KINGSDOWN.

20th Dec.,
1860.

A suit was instituted by the present Respondent in 1853, and the only question in the case is, whether the Respondent is barred from the prosecution of his claims in this suit by the Indian law of limitation.

It is necessary to the correct understanding of this case to state some of the circumstances under which the suit was commenced and the decree pronounced.

It appears that both the Appellant and Respondent are brothers ; their uncle died without issue in 1810 ; their father died in 1821, having succeeded to the property of their uncle, and he left the Appellant and Respondent, his two sons, joint heirs-at-law. The property which so devolved upon them was very considerable, and much litigation ensued as to the division and possession of that property, which was situated in various Districts ; to recover each portion of the property lying in various Districts, it would be necessary to institute proceedings in the various Courts having local jurisdiction.

On the 29th of *January*, 1827, the present Appellant instituted a suit against the Respondent, in the Provincial Court of *Calcutta*, to recover a certain share in *Zillah Jessore*, which was, in fact, a very

(a) 7 Moore's Ind. App. Cases, 323.

(b) 7 Sud. Dew. Rep. N. W. P. 337.

(c) 7 Sud. Dew. Rep. N. W. P. 158.

small part of the estates in question. Whilst this suit was pending, the parties to it came to an agreement to compromise their claims, and on the 4th of *April*, 1829, deeds of compromise were executed and filed in the *Zillah* Court—they agreed to divide the estate in certain proportions ; and it was further stipulated that, in the event of either of the parties not agreeing to act according to the terms of the compromise, they had no objection to the Court's insisting upon and enforcing the observance of the said compromise.

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The Respondent applied to the Collector for an *Ameen* to make a partition in terms of the above deeds.

On the 24th of *April*, 1829, the Appellant, who was the Plaintiff in that suit, presented a petition to the Provincial Court, praying that the suit might be struck off the file of the Court, on the ground of the compromise being effected. The Respondent, on the 25th of *April*, 1829, objected to this petition, and alleged that the compromise was not binding, undue influence having been exercised by the Collector to bring about the same.

The Provincial Court of *Calcutta*, however, on the 2nd of *September*, 1829, made the following order: that the case be struck off the file, and that the parties conform to their respective engagements; in the event of their not conforming to the same this Court shall insist on and cause them to conform to the conditions of the compromise. The suit was removed from the file on the 2nd of *September*, 1829, and the value of the stamp returned to the present Appellant.

The present Respondent appealed to the *Sudder Adawlut*. On the 21st of *June*, 1832, Mr. Walpole,

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decreed that the appeal should be dismissed, and that the decree of *September* the 2nd should be confirmed. He further stated, that the parties were entitled to take possession according to their respective rights under the compromise. On the 5th of *July*, 1832, Mr. *Ross*, another Judge of the same Court, declared his concurrence with Mr. *Walpole*.

Now, as these decrees were never appealed from, they are, to all intents and purposes, binding decrees. But, before proceeding further, it may be expedient briefly to consider the effect of the proceedings just recited. It is quite clear that the suit commenced on *January* 29th, 1827, was entirely at an end; and having been struck off the file, and the value of the stamp returned, no further proceedings could be had in that suit. But the Provincial Court were of opinion that, by the consent of both parties, they were entitled to take cognizance of the deed of compromise executed on the 4th of *April*, 1829, and to enforce the observance of the same, notwithstanding that the deed of compromise embraced property out of the *Zillah Jessore*, and in the *Zillah Twenty-four Pergunnahs*, and other places, which properties were not sued for in the original suit. Whether this proceeding was strictly regular or not cannot now be made a question. Of that opinion are all the Judges of the *Sudder Adawlut* which had cognizance of the present suit, including Mr. *Raikes*, who thought that there was an error in the first instance in the Court so taking cognizance.

We will now return to the consideration of what was done by the present Respondent upon the decrees of the *Sudder Adawlut* of *June*, the 21st, 1832, and *July* the 5th of the same year. He lost no time in

resorting to the Court for the purpose of recovering the mesne profits ; for in *September* of the same year (1832), he presented a petition, in what is called the Miscellaneous Department of the *Sudder Adawlut*, praying for mesne profits, agreeably to the Circular Order of *September* the 11th, 1829, which is in the following terms:—"The Court are of opinion that in all cases where money liable to bear interest is payable under the decree of a Court, a clause should be inserted in the decree providing for the allowance of interest until the decree is carried into final execution, and that in the event of such provision being omitted in a decree, the Court, by which the same may have been passed, is competent to order at any future period the payment of the interest on the amount decreed which may have accumulated subsequently to the date of the decree without referring the party to a new suit for the recovery of such interest ; and that the same principle is applicable to profits in cases of decrees for landed property."

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The *Sheristadar* of the Court reported on the back of the petition that no *wasilat* had been decreed to the Respondent by the said decree of the *Sudder Adawlut*, notwithstanding that it had been applied for. In consequence of the objection so raised by the *Sheristadar* on the 10th of *September*, 1832, the matter was again brought by petition before Mr. Ross, one of the Judges of the *Sudder Adawlut*, and Mr. Ross, then sitting alone, made an order that the Respondent was entitled to mesne profits, from the 5th of *July*, 1832, to the date of his obtaining possession ; and on *September* 18th, 1832, Mr. Ross made another order, again sitting alone, whereby he ordered that a copy of the Appellant's

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petition, with the decision of this Court, be sent to the Judges of the Court of Appeal at *Calcutta*, with an order that if the Appellant should not have already obtained possession of his proper share under the deed of compromise, possession should then be awarded to him in execution of the decision of this Court; and, further, that after awarding *wasilat* to the Respondent from the date of the decision of this Court to the date of the recovery of possession, a report that this order has been carried out, accompanied with the decision forwarded herewith, should be transmitted to this Court.

We do not find that the Judges of the Court of appeal at *Calcutta* took any further notice of these proceedings, and we might, perhaps, be at some loss to discover why, if there was any error in them, some observation respecting that error, some suggestion as to setting it right, should not have been made: however, nothing of this sort was done; various proceedings were had for the purpose of recovering this *wasilat* before several Judges in the *Zillah* Court of the *Twenty-four Pergunnahs*, and these proceedings were in the Miscellaneous Department.

This Court is not very accurately informed what is included under the term "Miscellaneous Department," but for the purposes of the present appeal that Department may be taken to include the carrying into effect decisions made by the Court of *Sudder Adawlut*, as contra-distinguished from the commencement of an original suit. In one of these proceedings, an order made by one of the Judges was carried up to the *Sudder Adawlut*, when that Court, on the 21st of *July*, 1853, decreed that the

order by Mr. Ross passed on the 10th of *September*, 1832, in favour of *Tarapersaud*, for *wasilat*, was, without the concurrence of Mr. *Walpole*, incomplete and not binding by law, and its execution not obligatory on the Court.

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Now, this decree not having been appealed from, must be considered as containing a correct statement of the law, but we may observe that the Court did not pronounce the decree of Mr. Ross to be null and void, and that the defect, such as it was, was never discovered during the whole of the preceding litigation for one-and-twenty years; though, of course, if this had been a palpable defect, there were very numerous opportunities for its discovery. The consequence of this decree of the *Sudder Adawlut* of the 21st of *July*, 1853, was that the present Respondent was thrown back upon the decrees of *June* 21st and *July* 5th, 1832, which decrees had ordered him to be put in possession of his proper share of the property, but had not decreed *wasilat*.

It might, perhaps, have been a question, whether, under those decrees of *June* 21st and *July* 5th, coupled with the Circular Order of *September* 11th, 1829, the Respondent had not obtained a decree giving him a right to *wasilat* accruing. But, however that might be, in the same year, 1853, the Respondent instituted the present suit, praying that his demand for *wasilat* should be admitted. One of the defences to that suit was, that his claim was barred by the law of limitation for all *wasilat* accruing at a period beyond twelve years from the institution of that suit. The Principal *Sudder Ameen*, amongst other matters which were decided by his decree, pro-

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nounced that the law of limitation did apply. The other matters were decided in favour of the present Respondent. Both parties appealed from this decree to the *Sudder Adawlut*, and on the 17th of *June*, 1857, that Court pronounced its decree, whereby it decided, by a majority of two out of the three Judges, that the law of limitation did not apply, and remanded the case to the *Zillah* Court for further consideration.

The question now for their Lordships to advise Her Majesty is, whether the majority of the *Sudder Adawlut* were right in their view of this case, and it may be first expedient to state, so far as is necessary, the Indian law of limitation. It is to the following effect:—"The *Zillah* and City Courts are prohibited hearing, trying, or determining the merits of any suit whatever, against any person or persons, if the cause of action shall have arisen previous to the 12th of *August*, 1765, or any suit whatever against any person or persons, if the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it, unless the complainant can show, by clear and positive proof, that he had demanded the money or matter in question, and that the defendant had admitted the truth of the demand, or promised to pay the money, or that he directly preferred his claim, within that period, for the matters in dispute to a Court of competent jurisdiction to try the demand, and shall assign satisfactory reasons to the Court why he did not proceed in the suit, or shall prove that, either from minority or other good and sufficient cause, he had been precluded from obtaining redress." (Regulation III. of 1793, sec. 14.)

Now, it appears to their Lordships to be clear, that

this cause of action cannot be said to arise upon the suit which was struck off the file in 1832, neither do we think that it can be properly said that the cause of action arose upon the agreement of compromise alone ; for it is obvious that all the proceedings have been founded upon the decrees of the 21st of *June*, and the 5th of *July*, 1832, decreeing possession to the Respondent. In fact, all the subsequent proceedings are subsidiary proceedings in the same suit, and all for the purpose of carrying into full effect those decrees which, though they did not in terms do more than decree possession, yet, taking into consideration the order of *September*, 1829, and the justice of the claim, gave the Respondent a right to *wasilat* up to the time when the Appellant did justice, and obeyed those decrees by allowing the Respondent to have possession of the property justly belonging to him. All these proceedings are connected together from the time that the rights of the parties were finally settled by the decree of *July* 5th. The Respondent was never remiss in the prosecution of his claims ; he resorted to the proper tribunals for that purpose, and, year after year, legal investigations were going on for the purpose of ascertaining the amount to which he was justly entitled. None of the many Judges engaged in these investigations detected any error or irregularity in these proceedings till 1853, when the Court of *Sudder Adawlut* for the first time discovered that the order made by Mr. *Ross* was ineffectual by reason of its not being confirmed by a second Judge.

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Admitting that such order was ineffectual, and that proceedings to enforce it could not avail, we think that such erroneous proceedings did not operate as a

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total abandonment of the rights under the decrees of *June* and *July*, 1832. We think that it may be fairly said that the Respondent was continually endeavouring, by resort to competent Courts, to recover his rights, and that he is not ousted from availing himself of the exception in the laws of limitation by reason that part of the proceedings was erroneous.

We concur with the majority of the Court, and deem it most expedient to found our concurrence upon the reasons we have stated, and do not take into consideration other matters which might admit of more doubt.

We shall humbly advise Her Majesty to affirm the decree of the 17th of *June*, 1857, with costs, feeling assured that it is consistent with a just construction of the law of limitation and with the justice and equity of the case.

CHETTY COLUM COMARA VENCATA- } *Appellant,*
 CHELLA REDDYER - - - - - }

AND

RAJAH RUNGASAWMY STREEMUNTH } *Respondent.**
 JYENGAR BAHADOOR - - - - - }

*On appeal from the Sudder Dewanny Adawlut at
 Madras.*

Hindu Law—Widow—Power of to bind estate—Bond by widow to discharge debts of husband and debts contracted by herself in management of the estate after adoption of son—Liability of estate in the hands of the adopted son—Effect of acknowledgment by adopted son.

A bond, executed by a Hindoo widow and guardian of an adopted son, during his minority, the object of which was, first, to pay off a debt due by her deceased husband, charged upon the *Zemindary*, and next to discharge certain debts contracted by her in the management of the *Zemindary*, the validity of which was recognized by the adopted son after he became of age, upheld: without determining the question raised of the power of a Hindoo widow, as guardian of a minor, to create a charge on the *Zemindary* during the minority of her adopted son.

THE object of this suit, which was brought by the Respondent against the Appellant, the *Zemindar* of *Torriore*, and his adoptive mother, *Dhurmavurdany Ummal*, was to recover the sum of Rs. 32,000, for principal and balance of interest due on a bond executed by *Dhurmavurdany Ummal* during the minority of the Appellant.

12th Feb.,
 1861.

The facts of the case material to the issue are so fully detailed in their Lordships' judgment, that it is not requisite to repeat them here.

* Present: Members of the *Judicial Committee*,—The Right Hon. the Lord Kingsdown, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

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The principal question raised at the hearing of the appeal was as to the power of a Hindoo widow in possession of a *Zemindary*, as guardian during the minority of an adopted son, to execute the Bond in suit, and charge the *Zemindary* for the payment of debts alleged to have been incurred in respect of the *Zemindary*, so as to bind the Appellant, after he had attained his majority. Upon this point, *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree* (a), *Strange's "Hindu Law,"* p. 18 (2nd edit.); and as to the debts of the deceased *Zemindar* forming an equitable charge upon the *Zemindary*, *Douglas v. The Collector of Benares* (b), *Strange's "Hindu Law,"* p. 166 (2nd edit.), were relied on.

The appeal was argued by

Mr. *R. Palmer*, Q. C., and Mr. *Speed*, for the Appellant ; and

Mr. *Giffard*, Q. C., and Mr. *Pontifex*, for the Respondent.

13th March,
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Judgment was pronounced as follows, by

The Right Hon. Lord KINGSDOWN.

In this case an action was brought by the Respondent against the Appellant, upon a bond for Rs. 17,000, dated the 27th of *August*, 1841.

The Respondent obtained judgment for the amount of the Bond, with interest, in the Civil Court of *Trichinopoly*, on the 10th of *March*, 1857.

This judgment was affirmed on appeal by the *Sudder Adawlut*, on the 5th of *May*, 1858, the Judges being unanimous.

From this decree the present appeal is brought.

(a) 5 Moore's Ind. App. Cases, 271.

(b) 6 Moore's Ind. App. Cases, 393.

The Appellant is the adopted son of the late *Zemindar* of *Torriore*. He was adopted by the widow of the *Zemindar* after his death ; and he is in possession of the *Zemindary*.

It appears that the widow, after the adoption of the Appellant, and during his minority, remained in possession of the *Zemindary*.

The death of the *Zemindar* took place in 1835. The lady seems, some years after the adoption, to have repented of what she had done, to have endeavoured to repudiate the act, and to have insisted on retaining the possession of the estate against the adopted son after he came of age. In fact, she continued in possession till *July*, 1851.

While she was so in possession, and on the 27th of *August*, 1841, she executed the Bond in question for Rs. 17,000, to *Rungasawmy Jyengar*, the natural father of the Respondent.

That this sum was advanced by *Rungasawmy Jyengar* is not disputed, but it is said that it was advanced on the personal security of the widow; that the bond did not purport to bind the *Zemindary*, and that the widow had no power to bind it; that the Appellant at that time had attained his majority, and that the widow was holding possession adversely to him, and could not, therefore, as guardian or manager of the estate, charge it with any debt which she might contract.

On the other hand, it is said that the amount of the Bond consisted in part of the balance due on a Bond executed to the same creditor by the late *Zemindar* himself, the husband of the obligor, in his lifetime, and that as to the remainder, the money was raised to pay other debts of the *Zemindary*, binding the *Zemindar*; that the bond, therefore, constituted

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a charge on the *Zemindary*, which the Appellant, as the owner, was liable to pay, and that he had, in fact, acknowledged his liability to do so after he came of age, both verbally and by a letter written in the year 1845, long after he had obtained his majority.

The Bond purports to be made on the settlement of an account between the widow and *Jyengar*, and to be given for moneys partly due from the late *Zemindar*, and partly advanced to the widow herself.

Rs.

The consideration for it is stated to be—

- | | |
|--|--------|
| 1. A balance due on a Bond from the late <i>Zemindar</i> , dated in <i>July</i> , 1832— | |
| 33 - - - - - | 8,700 |
| 2. A balance due on a Bond executed by the widow herself on the 27th <i>May</i> , 1840 - - - - - | 3,445 |
| 3. Cash received by the widow, through <i>Pillay</i> , her agent, on the 19th <i>August</i> , 1841 - - - - - | 3,031½ |
| 4. Cash received on the execution of the bond - - - - - | 2,000 |

Total- - - - - Rs. 17,176½

from which the sum of Rs. 176½ being relinquished by the obligee, there remain Rs. 17,000.

The Bond proceeds:—"This being the amount of debts incurred by my husband and myself, I shall pay the same, with interest at 1 per cent. per mensem, by yearly instalment of Rs. 2,000, payable in cash, from this year, and enter such payment at the foot of the Bond."

The Bond itself purports to bind nobody but the

widow, and the statement of the account could not of course bind the Appellant, who was no party to the instrument. On the other hand, it is plain that, from the contents of the Bond itself, the Appellant, if he saw it, would know for what causes it purported to have been given. But it consisted partly of moneys alleged to be due from his father, and partly of moneys admitted to have been advanced to the widow personally.

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Unless those moneys so advanced to the widow personally were advanced to pay subsisting charges on the estate or otherwise, for its advantage, they of course could constitute no charge on the *Zemindary*.

There is produced in evidence, and proved, a Bond from the late *Zemindar*, dated in 1832, for Rs. 5,000, bearing interest at 12 per cent., on which, after deducting the sums appearing by the Bond to have been paid, there would remain due for principal and interest, a sum exceeding Rs. 8,700, stated in the Bond for Rs. 17,000.

This Bond of 1832 is proved to have been produced at the time when the Bond in dispute was executed, and the amount settled of the sum due to *Jyengar*.

With respect to the sums advanced to the widow, their payment is regularly proved, and, indeed, that the transaction as between the lender of the money and the widow was a fair one is not in dispute.

As to the purpose for which these advances were made, it is sworn that the widow told the lender that she wanted money to discharge debts contracted by her husband with two persons named, and to pay

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maintenance to the widow of her husband's elder brother.

The fact that the money was required, and was advanced for these purposes, is stated by another witness who had been in the service of the late *Zemindar* and also of the widow, and who had been acquainted with the circumstances as they occurred.

The same fact is sworn to by other witnesses.

With respect to the evidence generally, it appears to their Lordships to be less open to suspicion than usually happens in appeals from *India*.

At the time when the debts were contracted for which the Bond for Rs. 17,000 was executed, and at the time of the execution of the Bond, the widow was in possession of the *Zemindary*, and the Appellant was living there under her protection.

It is said that the Appellant had before this time attained the age of sixteen years; his legal majority; and that he was entitled to the estate and was wrongfully kept out of it by the widow.

It is not very distinctly proved at what time the Appellant attained his majority. That disputes did take place between the widow and the Appellant with respect to the right of possession of the *Zemindary* sufficiently appears, but the period at which they commenced is not in evidence. The important matter is free from doubt, that during the period of these transactions and subsequently, and up to the time when the letter of the Appellant, to be presently referred to, was written, the Appellant was living on the *Zemindary*, and had, therefore, probably full means of ascertaining the real truth of the case with respect to these advances.

In this state of circumstances what took place is quite natural. The Appellant was the adopted son of the late *Zemindar*, entitled, as it seems, to the *Zemindary*; he was living there, and had attained his majority, and might reasonably be supposed to be in the enjoyment of the revenues.

Accordingly the Plaintiff, who considered that the money due to him was a charge upon the estate, applied to the Appellant for payment of the amount due on the bond.

It is stated by one of the witnesses "that the Plaintiff sent him to the Defendant to demand of him the said sum, and when he went to *Torriore*, and asked the Defendant, he said, 'I and my mother are at variance, and I can pay the debt only after we come to some settlement.' " The witness then says that he went to the widow and asked her, and she sent by her servant, *Jamboovien*, Rs. 1,000.

There is nothing improbable in this account. The witness says it happened about fourteen years ago. He was examined in *August*, 1856, and on referring to the bond it appears that Rs. 1,000 were paid in *May*, 1842.

This statement is confirmed by another witness, and other applications to the Appellant, and similar answers by him, are sworn to by other witnesses.

Nothing is more likely, therefore, than the account which is given in the evidence that, in 1845, Rs. 1,000 only having been paid in respect of the bond, a written demand of payment should be made on the Appellant, and that he should make in writing an answer to the same effect with that which he had given verbally on several previous occasions. A letter is accordingly produced and proved, dated

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the 11th of *March*, 1845, with the signature of the Appellant, which contains a distinct recognition of the Plaintiff's demand, and the same excuse for non-payment which he had previously offered, viz. that his mother was still in possession of the *Zemindary*, that the dispute between them was not settled, and that he had, therefore, no power to discharge the debt. He then distinctly states that on inquiry he finds that the Bond which the Plaintiff holds is genuine.

Now, it is said that this letter is a forgery, but there does not appear to their Lordships to be any evidence whatever to support the charge, nor any the least improbability in such a letter, under the circumstances, having been written.

The inference drawn from the evidence in both the *Zillah* Court and the *Sudder Adawlut* has been that this Bond was given for debts which the Defendant, as owner of the *Zemindary*, might be liable to pay, and that by his own acts he has admitted that he actually was liable to the payment, and their Lordships entertain no doubt that this is the right conclusion.

It is unnecessary, under these circumstances, to allude to the law upon these subjects as laid down by this Board on the case of *Hunnomanpersaud Pandey v. Mussumat Babooee Munraj Koonweree* (6 Moore's Ind. App. Cases, 393), with respect to the power of the manager of an estate on the part of an infant to charge it, for no question of law arises in this case when the facts are understood.

Their Lordships will have no hesitation in advising Her Majesty to affirm the decree complained of, with costs.

An objection was taken as to the Plaintiff's right to sue on the Bond, but that objection was sufficiently answered by the Respondent's Counsel at the hearing.

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VENCATASWARA YETTIAPAH NAICKER - - Appellant,
AND
ALAGOO MOOTTOO SERVAGAREN - - Respondent.*

On appeal from the Sudder Dewanny Adawlut at Madras.

Madras Registration Regulation (XXV of 1802), S. 8—Applicability—Perpetual lease of distinct portion of Zemindary (Cuttoogootaga tenure)—If requires registration—Deed—Genuineness—Burden of proof—Finding of lower courts—Interference by Privy Council.

A Cuttoogootaga tenure (perpetual lease at a low fixed rent payable to the Zemindar, granted in consideration of military services performed by the ancestors of the grantee) of a distinct part of a Zemindary in Madras, upheld.

A perpetual lease of a distinct portion of a Zemindary is not within the provisions of section 8 of Mad. Reg. XXV. of 1802, and does not require registration, as it is not a "sale, gift, or transfer" of the whole, or any portion of the Zemindary.

Semble: that section applies only to questions between the Zemindar and the Government with a view to prevent a severance of the Zemindary without public notice to the Government.

THE question in this appeal related to a claim by the Respondent to hold under a Cuttoogootaga tenure (perpetual lease at a low fixed rent payable to the Zemindar, granted in consideration of military services performed by the ancestors of the grantee) fifteen villages, forming part of the Zemindary of Yettiapooram, in Madras. The Appellant was Zemindar, and had dispossessed the Respondent of

14th & 15th
Feb., 1861.

* Present: Members of the Judicial Committee,—The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

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the villages. The case set up by the Appellant in defence to the action brought by the Respondent to recover possession of the villages was, first, that the Respondent and his ancestors never had any right to the villages other than as lessees for a term, under temporary leases, and that *Zemindars* had no power to grant lands included in their *Sunnuds* on a permanent lease ; and, secondly, that the permanent lease set up by the Respondent in support of his claim was a forgery, but even if a genuine lease, still, it could not, by sec. 8 of *Mad. Reg. XXV. of 1802 (a)*, operate so as to deprive the Appellant of the proprietary right in any portion of his *Zemindary*, as it was not registered in the Collector's office. The Respondent relied upon the genuineness of the lease, and in answer to the second branch of the defence, respecting registration, contended that sec. 8 of *Mad. Reg. XXV. of 1802*, did not apply, as the permanent lease of a distinct portion of the *Zemin-*

(a) This section enacts that "Proprietors of land shall be at free liberty to transfer, without the previous consent of Government, or of any other authority, to whomever they may think proper, by sale, gift, or otherwise, their proprietary right in the whole, or any part of their *Zemindaries* ; such transfers of land shall be valid, and shall be respected by the Courts of Judicature, and by the officers of Government ; provided that they shall not be repugnant to the Mahomedan or Hindoo laws or to the Regulations of the British Government. But unless such sale, gift, or transfer, shall have been regularly registered at the office of the Collector ; and unless the public assessment shall have been previously determined and fixed on such separated portions of land, by the Collector ; such sale, gift, or transfer, shall be of no legal force or effect ; nor shall such transaction exempt a *Zemindar* from the payment of any part of the public land-tax assessed on the entire *Zemindary* previously to such transfer, but the whole *Zemindary* shall continue to be answerable for the total land-tax, in the same manner as if no such transaction had occurred."

dary was not included in the words "sale, gift, or transfer," and he further insisted that, as the *Cuttoogootaga* tenure of the Respondent's ancestors existed before the *Istimzar sunnud*, the title under which the Appellant claimed the *Zemindary*, the objection that the *Zemindar* had no power to grant a permanent lease of part of the *Zemindary* could not be supported, as *Mad. Reg. IV. of 1822*, provided that the Permanent Settlement of 1802, and the granting of the *Sunnuds* "were not intended to define, limit, infringe, or destroy, the actual rights of any description of landholders or tenants." Evidence was entered into by both parties in the Courts in India; both of which Courts established the Respondent's title, and made a decree in his favour, with mesne profits.

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The circumstances of the case, and the material documents relied on, are sufficiently referred to in their Lordships' judgment.

Sir *Hugh Cairns*, Q.C., Mr. *J. B. Norton*, and
Mr. *W. H. Melvill*, for the Appellant, and

Mr. *R. Palmer*, Q.C., and Mr. *W. W. Mackeson*,
for the Respondent.

Upon the question of the genuineness of the lease, the Respondent relied upon the concurrent judgments of the Courts of India in his favour, citing *Cheytt Ram v. Chowdree Nowbut Ram* (a), and it was submitted, that if any doubt existed the Court had power to order the original lease to be transmitted to *England* for inspection. *M'Carthy v. Judah* (b), *Mussumat Khoob Koonwur v. Modnarain Sing* (c).

(a) 7 Moore's Ind. App. Cases, 207. (b) 12 Moore's P. C. Cases, 47.

(c) 6th Feb., 1861.

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Their Lordships' judgment was delivered by

13th March,
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The Right Hon. Lord KINGSDOWN:

This appeal arises in a suit brought by the Respondent to establish a claim to hold in perpetuity, at a fixed rent, certain villages forming part of the *Zemindary* of *Yettiapooram*, which belongs to the Appellant.

The Civil Court of *Tinnevelly*, in which the suit commenced, decreed in favour of the Plaintiff's title, and that judgment has been confirmed by the unanimous opinion of the Judges of the *Sudder Adawlut* of *Madras*.

The *Zemindary* in question is of great extent, comprising above one hundred villages; the claim of the Respondent extends to fifteen of them.

The case of the Respondent is, that he and his ancestors have had some right or interest in those villages, or the District in which the villages now exist, for a very long period, long antecedent to the establishment of the English authority in the country, and that when the English authority was established in 1803, a grant of the whole *Zemindary*, without noticing the rights of the Respondent's family, was made at a fixed *jumma* to the Appellant's ancestor.

That in order to secure such rights, without disturbing the grant of the *Zemindary*, an agreement was made in the year 1805, between his ancestor and the then *Zemindar*, by which it was settled that the Respondent's ancestor and his descendants should hold the fifteen villages in question on a *Cuttoogootaga* lease, or, in other words, should hold them in perpetuity at a low fixed rent payable to the *Zemindar*,

and that such rent was fixed at 1,940 *pons*, being in fact the proportion of *jumma* which was assessed upon them by the Government.

The Respondent alleges that he and his ancestors remained in possession of these villages under this agreement for many years till he was turned out of possession by the Appellant in the year 1848.

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The case of the Appellant is an extremely simple one. He alleges that the case set up by the Respondent is a pure fiction; that the documents which he produces in support of it are mere forgeries; that the Plaintiff's possession began in the year 1814, under an *Ijarah* lease, or in other words an ordinary tenant lease at a rent agreed upon; that such lease was from time to time renewed for different periods, the last of such leases being made on the 29th of *July*, 1836, for twelve years, on the expiration of which the Plaintiff, having no longer any right to the property, was turned out of possession.

In support of this case, certain instruments purporting to be counterparts of these leases are produced, and it is admitted that if they are genuine they are quite inconsistent with the right alleged by the Respondent.

There is clearly forgery either on one side or the other; and both of the Courts below, who had the documents before them, have concurred in attributing the forgery to the leases produced by the Appellant.

It would be a strong measure for their Lordships upon a question of fact to reverse a decision founded, at least in part, upon an examination of the documents themselves, in which all the Judges below

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came to the same conclusion. At the same time, cases may exist warranting such a course, and one was mentioned at the Bar in which this Board did actually adopt it (a). The question is, whether such a case has been made out by the Appellant.

No doubt the onus was on the Respondent, who was the Plaintiff, to prove his case.

Let us see, then, what the evidence on each side was.

The first instrument produced was a deed on copper, dated in 1557, and purporting to contain a grant of the District in question to an ancestor of the Respondent. It was produced by the Respondent, who was the proper person to have it in his custody, and some objections alleged to exist upon the face of it, as if it had borne to be executed by a person not then enjoying the sovereignty of the country, seem to have been removed by the diligence and exact investigation of Mr. Mackeson.

Many other documents were produced, beginning in the year 1712, and bearing different dates in 1747, 1749, 1777, 1779, and 1789, all showing dealings with the property by ancestors of the Respondent.

It is said that there is no proof of these papers; they are all of a date which excludes the possibility of direct proof; but they are proved by the production itself to come from the possession of the Plaintiff, and the want of formal proof that they were found in his muniment-room cannot be regarded as of any importance in a suit of this description.

It is contended, however, that they are, if genuine, inconsistent with the case now made by the Respon-

(a) See McCarthy v. Judah, 12 Moore's P. C. Cases, 47.

dent, because the original grant appearing to be rent free, it is improbable that the Respondent's ancestor could ever have accepted a lease charging him with a rent, and yet such is the nature of the lease now set up as the foundation of the Respondent's title.

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But the documents produced show, that whatever might be the case originally, there was, in 1712 a certain tribute payable by the whole *Zemindary* of which one-sixteenth part was apportioned to the Respondent's district.

The Judges below placed no reliance on these documents, not, so far as appears, because they disbelieved their genuineness, which their Lordships see no reason to doubt, but because they held them to be immaterial to the Plaintiff's case. They are, however, of some value as a matter of inducement, showing the probabilities of the statements made by the opposite party.

The next document which the Plaintiff puts in evidence is the instrument on which he rests his claim. It is a paper writing, alleged to be signed on the 5th of *August*, 1804, by the then *Zemindar* of *Yettiapooram*, and addressed to the ancestor of the Respondent in these terms:—"As I have leased out to you fifteen *Cuttoogootaga* villages," it then enumerates them "attached to *Cuttalangoolam* division, under a deed for the fixed rent of 1,940 *pons*, you should, without delay, continue to pay, every year, the said amount into the treasury of the *Yettiapooram Cutcherry*, and yourself, your son, and grandson, can enjoy the said fifteen villages for ever, paying the *kist* amount thereof."

Supposing this document to be genuine, of course

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there is an end of the case. It is, however, alleged by the Appellant to be a forgery.

The direct evidence in support of it is not very satisfactory; it is spoken to by several witnesses who profess to have seen it, and to remember its execution nearly fifty years before, on whose testimony, however, no great reliance can be placed; but if the dealing with and possession of the estate has been consistent with the instrument, its date sufficiently accounts for the absence of better direct testimony.

The next document, in point of date, is a mortgage, dated in 1811-12, made by the grandfather of the Respondent, to a person named *Pillay*, of a portion of this property for a term of ten years.

The mortgagee is sworn by two witnesses to have been in possession under this instrument, and, when the debt was satisfied, to have returned the deed to the mortgagor.

Now, the date of this instrument is more than two years before, as the Appellant alleges, the Respondent's family, had anything to do with the property.

In addition to this, there is the testimony of many old witnesses that the ancestors of the Respondent had been in possession of this property for very many years, and long before the period assigned by the Appellant for the commencement of such possession. The office of *Servagar* appears to be one of authority, implying the command of one hundred men, and it is shown to have been held in this *Zemindary* for a very long series of years by the family of the Respondent, and it is further shown that the grant of lands in *Cuttoogootaga* or *Java-tha*, is a usual mode of remunerating such services.

The case, therefore, of the Respondent is probable and consistent.

But the evidence goes a great deal further, and shows very clearly, in the opinion of their Lordships, that the title of Respondent has been repeatedly admitted by the ancestors of the Appellant.

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The lessee seems not to have been very punctual in the payment of his rent, and, in the year 1822, the *Zemindar* found it necessary to apply to the Collector at *Tinnevelly* to enforce payment, and he presented an *arzee* on the 27th of November, 1822, to Mr. *Huddleston*, the then Collector.

The *arzee* in question comes from the Collector's office; it is open to no suspicion, and it is of itself sufficient to disprove the Appellant's case, and to afford a strong confirmation of the statements of the Respondent. It is to this effect:—"Fourteen villages in *Cuttalangoolam* division, attached to the *Zemindary* which was obtained by my late father from the Honourable Company, were given to *Alagoo Moottoo Sevagaren*, son of *Alagoo Moottoo Servagren*, of the said *Cuttalangoolam*, for his maintenance at a *jumma* of *pons* 1,959, a-year which was paid by him, and, after him, by his son, *Alagoo Mootho Servagaren*, in fact, up to the 992 *Aundoo* (this date corresponds with the year 1816); but he had entirely discontinued the payment of the same for the *Aundoo* 993 and 994, though he was holding out mere promises whenever demands were made for it; the balance due by him from the *Aundoo* 994 to 997, amounts to about *pons* 1,541, and *fanams* 5 $\frac{3}{4}$."

This is a statement, therefore, that the villages had been ganted to the ancestor of the Respondent for his

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maintenance at a fixed *jumma*, and that up to the year 1816 the rent had been regularly paid by the grantee, and by his son, and yet it is now pretended by the Appellant that the Respondent's ancestor first came into possession of the property in 1814, and then under an *Ijarah* lease. It is clear that this statement refers to the payment of rent for a considerable period, and could not mean a payment for two years. There is evidence, indeed, that the person to whom this grant is said to have been made, and who is represented to have paid rent under it, died in 1808.

The *Zemindar* then prays that the property of *Alagoo Moottoo* may be attached to pay this demand.

There is another document less strong, but, as far as it goes, confirmatory of the Plaintiff's case.

It is found in an order of Mr. *Bird*, the Collector, made in the year 1845, at which time disputes had arisen with respect to the boundaries of some of the villages in the *Zemindary*, and, amongst others, of villages in the District of *Cuttalangooram*, the District claimed by the Respondent.

This order mentioned that the *Zemindar* had submitted an *arzee*, stating that he had nothing to do with certain lands therein mentioned, "which are in the enjoyment of the *Merassidars* of *Cuttalangooram*, to whom he had leased it out under *Cuttoogootaga* tenure."

There is abundant other testimony in support of the Respondent's case, and in direct contradiction of the Appellant's but it is useless to pursue it further. Their Lordships have not the slightest doubt that the Court below could have arrived at no other conclusion than that the case set up by the Appellant

was based in fraud and perjury, and that as far as the facts are concerned, the Plaintiff had completely established his claim.

It is hardly worth while to notice the objections taken to the Plaintiff's documents.

First, it was said that the sum mentioned in the paper of 1805 (1,904 *pons*, as printed in the Records) differed from the actual rent of 1,959 *pons* and some *fanams* actually paid.

It appeared, however, very clearly, that the 1,904 *pons* was a misprint for 1,940, and that the difference between 1,940 and 1,959 odd was accounted for by the addition of *shroffage*.

The representation of the Appellant that the division of the *Zemindary* claimed by the Respondent contained only thirteen villages at the period when his title commenced, and that two of them were added afterwards, is clearly disproved by the public accounts for the year 1802, showing that at that time *Cuttalangooram* was a known District held on *Cuttoogootaga*, containing the fifteen villages of which it now consists, and was subject to an assessment of 1,000 pagodas.

It is said, however, that whatever may be the Respondent's right in point of fact, he is precluded from recovering by an objection of law, viz. that the Plaintiff's title is not registered according to the *Madras Regulation XXV.* of 1802, sec. 8; and it is said to have been settled in India that although an instrument not registered may be good against the *Zemindar* who executed it, the successor is not bound by it.

The language of the Regulation would seem to apply to questions between the *Zemindar* and the

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Government, and to have been framed with a view of preventing a severance of the *Zemindary* without public notice to the Government. It is not very obvious upon what principle it can be held that an instrument good against the party making it is bad against an heir, if the ancestor had an absolute power of alienation. If the successor is, as we should term it, a remainder man, or claiming by a title which the ancestor could not defeat, the case, of course, is different.

But their Lordships are of opinion that there is in this case no ground for the objection. This is not an alienation of the *Zemindary*, or any part of it. It is a perpetual lease of a distinct portion of the *Zemindary*, which constituted a distinct portion before the Appellant's title to the *Zemindary* accrued, and such an estate could not, without great violence to the language, be considered as a transfer within the words of the Regulation. The title of the Respondent has been recognized not only by the *Zemindar* who created it, but by subsequent *Zemindars*, and there has been a possession under it of above fifty years.

Their Lordships will advise Her Majesty to affirm the judgment complained of, with costs.

MOSES KERAKOOSE - - - - - Appellant,
 AND
 BENJAMIN BROOKS - - - - - Respondent.*

*On appeal from the Supreme Court of Judicature at
 Madras.*

*Insolvent Debtors' Act of 1848—After-acquired property of un-
 discharged insolvent—Right of Official Assignee to—Right of creditors to
 lien.*

Under the Imperial Statute, 11th & 12th Vict. c. 21. relating to Insol-
 vent debtors in India, the Assignees have a right to subsequently-acquired
 property of an Insolvent, unless the Insolvent has obtained a certifi-
 cate and discharge, but this title of the Assignees is subject to two
 qualifications—first, when the Insolvent has acquired property subject
 to liens and obligations; in such a case the property taken is subject
 to the equities and charges which effect it in the hands of the Insol-
 vent; and, secondly, when the Insolvent carries on trade at a sub-
 sequent period, with the assent of the Assignees, the property which is
 acquired in the subsequent trade will be subject in equity to the charge
 of creditors in that trade, in priority to the claim of the Assignees.

An uncertificated Insolvent borrowed money for the purpose of pur-
 chasing goods to carry on a business, and in order to secure the advances
 made, gave a Bond, and agreed in writing, to execute a mortgage of
 the goods so purchased to the lender to secure repayment. He after-
 wards executed an assignment of the goods for that purpose. The busi-
 ness was carried on with the knowledge of, and without any objection
 by, the Official Assignee. The lender never had possession of the goods
 assigned to him by the Insolvent, and the same remained in possession
 of the Insolvent until his death. Held (reversing the decree of the

In the Supreme Court of Madras the following
 special case was stated:—

6th Dec.,
 1860.

A. Cundasawmy Moodelly was on the 23rd of
 April, 1858, by the Court for the relief of Insolvent

* Present: Members of the *Judicial Committee*.—The Right
 Hon. Lord Chelmsford, the Right Hon. Lord Kingsdown, the
 Right Hon. Dr. Lushington, and the Right Hon. Sir Edward
 Ryan.

Assessors.—The Right Hon. Sir Lawrence Peel, and the Right
 Hon. Sir James W. Colville.

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Supreme Court at *Madras*) that the Insolvent's after-acquired property was subject to the lien of the lender, and that such lien was paramount to any claim of the Official Assignee under the insolvency.

The sum involved was under the prescribed amount limited by the Order in Council of the 10th of *April*, 1838. Upon a special application the fact appearing that the question involved the construction of an Act of Parliament respecting the operation of the law of Insolvent debtors in *India*, leave to appeal was granted.

Debtors at *Madras*, adjudged to have committed an act of Insolvency under the 18th *Vict.*, c. 21, sec. 9, and on the same day the usual vesting order was made under the 11th section.

Such adjudication of Insolvency was not questioned by the Insolvent, who afterwards filed his schedule in the matter, and on the 18th of *September* obtained his personal discharge under section 47.

The Insolvent did not file any petition under the 60th section, nor did he obtain his discharge in the nature of a certificate.

The Insolvent previous and up to his Insolvency was the proprietor of an hotel which was known as the "Imperial Hotel," and after his discharge this hotel was kept by *T. Soondarum Moodelly* and *P. Appavoo Moodelly* who engaged the Insolvent, on a salary of Rs. 40 a month, to manage as their servant the hotel known as the "Imperial Hotel;" and he did so manage the same down to the 7th of *February*, 1859.

On the 7th of *February*, 1859, the Insolvent borrowed from the Defendant, *Moses Kerakoose*, who was aware of such insolvency, Rs. 10,000, and on the same day he executed his Bond to *Moses Kerakoose* in the penal sum of Rs. 20,000, conditioned for payment of Rs. 10,000, and interest at 12 per cent. per annum, three months after date.

On the same 7th of *February*, 1859, the Insolvent,

from and out of the sum of Rs. 10,000, so borrowed and received by him from the Defendant, paid to the said *T. Soondarum Moodelly* and *P. Appavoo Moodelly* the sum of Rs. 6,500, for the purchase of the furniture, stock-in-trade, and goodwill of the hotel, and expended the remaining sum of Rs. 3,500, in the purchase of certain carriages, horses, and harness, to be let for hire.

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On the same day the Insolvent, in further performance of his agreement with the Defendant, executed to *Moses Kerakoose* an instrument under seal, in these words:—

“ Know all men by these presents that I, *Agappah Cundasawmy Moodelly*, for the better securing the repayment of the within sum of Rs. 10,000 so borrowed and received by me at the time within mentioned; have granted, bargained, sold, assigned, and set over unto *Moses Kerakoose*, his heirs, executors, administrators or assigns (Here the items of property, goods, and chattels were inserted, and the instrument then proceeded) and all my interest due and to grow due thereon, and all my right, title, interest, claim or demand whatsoever of, in, or to the same, and should default be hereafter made in payment of the within sum of Rs. 10,000, so borrowed and received by me as aforesaid, when the same shall become due, then I do hereby for myself, and my heirs, executors, and administrators, authorize and empower the said *Moses Kerakoose*, by giving me three days’ notice, to sell and dispose of the said (Here the items of property were inserted over again, and the instrument then concludes in these words) hereby assigned and set over, or intended to be, and to pay and apply the proceeds of such sale in discharge of the principal and interest

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due on the within bond. *Agappah Cundasawmy Moodelly.* Signed, sealed, and delivered, where no stamp paper is to be had, in the presence of *Satour Lazar, C. Theroovengadow Moodelly.*”

The whole of the goods and chattels mentioned in the instrument were purchased by the Insolvent, by and with the sum of Rs. 10,000, so as aforesaid lent and advanced by the Defendant to the Insolvent, and the sum was lent and advanced by the Defendant to the Insolvent, on the express understanding and agreement, that the same was to be laid out by him in the purchase of the goods and chattels, and that the same, when so purchased, were to be mortgaged by the instrument, above set out by the Insolvent to the Defendant to secure to him the repayment of the sum of Rs. 10,000 and interest.

The whole of the goods and chattels mentioned in the above instrument were contained in, and kept upon, the premises, called the “Imperial Hotel,” situate on the road leading to *St. Thomas’ Mount*, in which the Insolvent from and after the 7th of *February*, 1859, with the Plaintiff’s knowledge carried on business, as an hotelkeeper, on his own account.

Moses Kerakoose had no possession of such goods and chattels, or of any part thereof; but the same remained in the Insolvent’s possession, down to the date of his death.

The Official Assignee had no knowledge of the Insolvent’s transactions aforesaid with *Moses Kerakoose*, or of the purchase of property in the hotel, from *T. Soondarum Moodelly* and *P. Appavoo Moodelly*.

The Insolvent departed this life, on the 7th of *April*, 1859, intestate, leaving a widow surviving him,

who declined to administer to his estate, and other debts besides that to the Defendant contracted subsequent to his insolvency.

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Moses Kerakoose, immediately after the death of the Insolvent, and on the 7th of *April*, 1859, instructed Messrs. *Ashton, Richardson & Co.* to take possession of all the goods and chattels mentioned and set out in the instrument of the 7th of *February*, 1859, and they accordingly placed their *Peons* in charge of the Hotel and of the goods and chattels mentioned in the instrument of the 7th of *February*, 1859.

The Official Assignee, on the 8th of *April*, 1859, instructed Messrs. *Ashton, Richardson & Co.* to take possession of all the goods and chattels contained in or standing on the premises which were reputed to belong to the Insolvent, and thereupon a dispute arose between the Defendant and the Plaintiff as to the right of the Defendant to the property mortgaged by the Insolvent, above set out, and it was ultimately agreed that the property so taken possession of by Messrs. *Ashton, Richardson & Co.*, under the orders of the Defendant, together with all the other property in the hotel, should be sold by them at a public auction.

The nett proceeds of the sale of the property mentioned and set out in the instrument of the 7th of *February*, 1859, amounted to Rs. 8,234. 7a. 9 p.

It was agreed that such nett proceeds should represent the goods and chattels, and that no action for damages should be brought by either party against the other, in respect thereof, and that both parties should submit themselves to the judgment of the Supreme Court in this matter.

The question for determination of the Court was,

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whether such nett proceeds formed part of the estate of the Insolvent, to be distributed amongst the creditors under the insolvency, and if so, then that the same might be declared and decreed accordingly.

The special case was argued before the Supreme Court on the 2nd of *September*, 1859, and stood over for judgment until the 12th of *September*, 1859, when the Court decreed that the nett proceeds formed part of the estate of the Insolvent, and passed to the Plaintiff as his Assignee. After stating the above facts, the learned Judge, Sir *Adam Bittleston*, proceeded as follows:—"The Defendant never had possession of the goods assigned to him by the instrument of assignment of the 7th of *February*, 1859, but they remained in the possession of the Insolvent, who, from and after that day to the day of his death, the 7th of *April* in the same year, carried on business as an hotel-keeper on his own account. The case finds that the Insolvent so carried on business with the knowledge of the Official Assignee, but that the Official Assignee had no knowledge of the Insolvent's transaction with the Defendant, nor of the purchase of the property in the whole from *Soondrum Moodelly* and *Appavoo Moodelly*. Upon the death of *Cundasawmy*, the goods in question were claimed by the Defendant under his mortgage, and, his title being disputed by the Official Assignee, the property has been sold; and the question submitted by agreement to this Court is, whether the nett proceeds of such sale form part of the estate of the said Insolvent to be distributed amongst the creditors under the said insolvency. Now, the language of the Insolvent Act is perfectly clear. It leaves no room to doubt that the effect of the vesting order is to vest in the Official Assignee all the future estate, title, and

interest of the Insolvent in any effects which he may purchase after his insolvency, as well as in any property to which he may have been previously entitled. The situation of an Insolvent who has not obtained his discharge in the nature of a certificate under the Statute, 11th & 12th Vict., c. 21, is not materially different from that of an uncertificated Bankrupt under the English Bankrupt Laws ; and, as a general rule, it was not disputed at the Bar that an uncertificated Bankrupt has no power of acquiring property for himself, but whatever he acquires passes to his Assignees. In *Everett v. Backhouse* (10 Ves. 99), the Master of the Rolls, Sir William Grant, says, ' It is clear, being an uncertificated Bankrupt, he could acquire property only for the benefit of his creditors under those commissions, unless, indeed, under very particular circumstances ; where the Assignees may by their conduct have precluded themselves from claiming the property, which they have permitted the Bankrupt to acquire in the trade in which he was afterwards engaged, as in *Troughton v. Gitley* (Ambler, 630) ; but in other cases, without those particular circumstances, it is perfectly clear the Bankrupt, either by himself or a partner, acquires property not for himself or his new creditors, but for the Assignees under the existing commissions.' Accordingly, it was argued, on behalf of the Defendant, that this case fell within the principle of the decision in *Troughton v. Gitley*, and the comparatively recent case of *Tucker v. Hernaman* (1 Sm. & Giff. 394. S. C. 4 De G. Masc. & Gor. 395) founded upon it. But it seems to me that the present case cannot be governed by those decisions. In *Troughton v. Gitley*, the Assignees were parties to the original arrangement, by which the Bankrupt was put into possession of property for the

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purpose of enabling him to carry on his trade ; he was afterwards suffered to trade for four years without interruption or claim, and, upon his death, after he had made profits in his trade, the question arose between the two sets of creditors in an administration suit, and the Court held that the creditors under the commission had, by their conduct, lost their priority. In *Tucker v. Hernaman* (1 Sm. & Giff. 399), V.C. *Stuart* says, it was decided by *Troughton v. Gitley* that the Assignee of a Bankrupt who has neglected his duty in suffering the Bankrupt to contract debts and amass property, is to be postponed to subsequent creditors. And in the same case upon appeal, 4 De G. Mac. & Gor. 399, *L. J. Turner* said, 'The case of *Troughton v. Gitley*, is a clear authority for this, that, if creditors under a commission in bankruptcy, permit the Bankrupt to carry on his trade subsequently to the issuing of that commission, those prior creditors, as in the case of a prior mortgagee standing by and suffering a subsequent mortgage to be made, without giving notice of his security, lose their priority in respect to the debts which were due to them ; and that in the administration of the estate of a Bankrupt so circumstanced, the debts of creditors incurred subsequently to the commission must be paid in priority, upon the authority of *Troughton v. Gitley*, thus understood, *Tucker v. Hernaman* was decided. But is this the case of a man having a lien standing by and letting another make a new security? On the 7th *February*, what had the Official Assignee or the creditors done to preclude them from claiming any property which the Insolvent might acquire by purchase? where is the conduct amounting to a declaration to all mankind

that he had sufficient capacity? The case states that he did on that day purchase the goods in question, and the Defendant claims under an assignment from him; neither the Official Assignee nor the creditors under the insolvency had any knowledge of that transaction, and it is difficult to understand how they can be prejudiced on the ground that they permitted that to take place which they had no means of preventing. In the fact that the Insolvent afterwards for two months carried on trade on his own account, with the knowledge of the Official Assignee, I can discover no ground for depriving the creditors under the commission of their priority over the Defendant; and the fact that other debts, besides that of the Defendant, were contracted subsequent to this insolvency, does not seem to me materially to affect the question as between the Defendant and the creditors under the insolvency. It was not discussed at the bar, whether the creditors whose debts were contracted during the two months when the Insolvent was carrying on trade on his own account with the knowledge of the Official Assignee, would be entitled to priority. Indeed, those creditors are not parties to this case; their interests have not been represented here, and they would not be bound by this decision. But I have given some consideration to that question; and though their case comes much nearer to the case of *Troughton v. Gitley* than the case of the Defendant (so that if the Insolvent had made profits by his trade, even in the short period of two months, I should have been strongly inclined to think that they would have had a prior claim upon the profits acquired in that trade), yet, inasmuch as the property in question was not acquired in the trade, but before

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the trade was commenced, nor with the concurrence of the Official Assignee or creditors, but without their knowledge, it seems to me that the equity established in *Troughton v. Gitley* does not apply in this case, even in favour of those creditors whose debts were contracted during the trading. It is observable that in *Tucker v. Hernaman*, the fund upon which the subsequent creditors were held to have a prior claim appears to have consisted wholly of the profits realized in the business carried on after the bankruptcy; and though, in *Troughton v. Gitley*, the priority given to the subsequent creditors extended to the original fund with which the Bankrupt commenced trading after his bankruptcy, as well as to the profits realized by him afterwards in that trade, yet there the original fund and the subsequent profits were equally acquired with the knowledge and assent of the assignees under the commission. It might be argued, on behalf of this class of creditors, that though the Official Assignee knew nothing of the transaction with the Defendant, or of the purchase of the goods by the Insolvent, yet, as he knew that possession of them had been delivered to the Insolvent, and permitted him with those goods to trade on his own account, he held out the Insolvent as a trader who might be trusted, and by so doing he has precluded himself from asserting the prior right of the creditors under the insolvency to any part of the property employed in that trade. But the possession which the Insolvent had was not inconsistent with the supposition that the property remained vested in others; and, indeed, the claim of the Official Assignee seems, at first, to have been made upon such supposition, for he directs Messrs. *Ashton & Richardson*

to seize such goods as were reputed to belong to the Insolvent ; and I am not aware that it is any part of the duty of an assignee to interpose for the purpose of preventing an Insolvent from carrying on his trade, if any friend of the Insolvent is willing to trust him with the possession of goods for that purpose. I do not see how he could effectually prevent such an arrangement, and the interests of the creditors under the insolvency might often suffer if he did ; for, if the trade is subsequently carried on with profit, the fund realized is liable to their debts, after those of the subsequent creditors have been discharged. Therefore, upon the whole, under the very peculiar circumstances of this case, I think that even the creditors, whose debts were contracted during the two months, from the 7th of *February* to the 7th of *April*, could not, as regards payment out of this fund, claim priority on the creditors under the insolvency. There is one other point of view in which I have considered this case. Lord *St. Leonard's*, in *re Atkinson's Trust* (2 De G. Mac. & Gor. 143), says, 'It may be considered as decided that the Assignee in insolvency represents the Insolvent ; he stands in his place, and takes only such interest as he can give, and subject to all equities to which the Insolvent himself is bound ;' and, under the influence of feeling that the case was one of some hardship upon the Defendant, I have given some consideration to the question whether any equity in the Defendant's favour, binding on the Assignee, could arise out of the agreement between the Defendant and the Insolvent ; that the money lent by the one should be applied by the other in the purchase of the specific goods in question ; and that they should be immediately mortgaged to the

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BROOKS. Defendant; but it is clear that the intention was that the property in the goods should vest in the Insolvent; and the Defendant knew that he was dealing with an insolvent, and that circumstance seems to me fatal to any claim for equitable relief on his part. He must be taken to have consented to advance the money upon such a security as the Insolvent was legally competent to give, and, if he took a security which was worthless, he took it with full knowledge of the circumstance which rendered it so; and ignorance of the law is not to be presumed; and if presumed, would not afford a title to relief. In the case of *Meux v. Smith* (1 Mont. D. & De G. 396), which I mentioned on the argument, it appears that the Plaintiffs, who, upon deposit of a lease, advanced £1,000 to an uncertificated bankrupt upon the transfer to him of the lease of a public-house, were ignorant of his bankruptcy at the time, and that the very same act which gave existence to the lease, viz. the delivery, was the act which constituted the deposit and the lien. I have come to the conclusion that, in this case, the property in these goods acquired by the Insolvent by purchase, passed to the Official Assignee by the operation of the vesting order, and that the proceeds of the sale form part of the Insolvent's estate, to be distributed under the insolvency. In this result there may, at first sight, appear to be some hardship upon the Defendant; but it may reasonably be supposed, that he speculated upon the probability of the Insolvent being able to carry on a profitable trade, and of succeeding in realizing a fund sufficient to pay him as well as his other creditors; at all events, he might, if he had so chosen, have purchased the goods himself, in which

case some notice, at least, would have been given ^{1860.} that the property in the Insolvent's possession was ^{KERAKOOSE} not his own. And, as was said by *Bayley, J.*, in ^{v.} *Nias v. Adamson* (3 Bar. & Ald., 231), 'there is no hardship in this, for it is clear, that the goods cannot be purchased with money belonging to the Bankrupt himself; and, if purchased by money belonging to a friend, it is as easy for the friend to buy it and to have the legal property transferred to him.' "

The Defendant filed in the Supreme Court a petition for leave to appeal to Her Majesty in Council against the judgment of the Court, but as the subject matter was under Rs. 10,000, the Court refused to allow the appeal.

The Defendant then presented a petition to Her Majesty in Council, praying for leave to appeal from the decree of the Supreme Court. The grounds for the application, as stated in the petition, were, that the application for leave to appeal was refused by the Supreme Court solely in consequence of the Order in Council of the 10th of *April*, 1838, the amount of the nett proceeds being under the appealable value of Rs. 10,000, therein prescribed; that the question at issue was one of general interest in the insolvency beyond the mere amount of the nett proceeds, inasmuch as the other creditors of the Insolvent, subsequent to the insolvency, were interested in, and the other property acquired by the Insolvent since his insolvency was affected by, the decision, and that the question was also of general importance in *India*, as involving the construction and working of the Insolvent Act, 11th & 12th *Vict.*, c. 21.

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Mr. *R. Palmer*, Q.C., in support of the petition.

Their Lordships* granted the application, upon the sum of £300 being deposited for costs.

The appeal now came on for hearing.

Mr. *R. Palmer*, Q.C., and Mr. *W. W. Mackeson*, for the Appellant.

It is submitted, first, that the loan, bond, and mortgage formed one contemporaneous transaction. The mortgage was endorsed on the bond, and it was the intention of the parties, previous to the purchase and loan, that the lien or charge of the Appellant upon the property should precede any interest of the Insolvent. Such is clearly the substantial effect of the acts and dealings of the parties, and unless this view be taken, the assignment was without meaning, as the debts of the Insolvent exceeded the value of the goods and chattels intended to be mortgaged. But, secondly, even if the goods had not vested in the Appellant, as we insist they did, the fact of the Insolvent having been allowed by the Official Assignee to carry on the business of the Hotel on his own account, and deal with the goods and chattels as his own property, is conclusive against any claim by him on behalf of the creditors, and estops him from disputing the assignment to the Appellant. As the Official Assignee did not, under the 86th section of the Statute 11th & 12th *Vict.*, c. 21, enter up judgment against the Insolvent, he cannot claim any property acquired by the

* Present: *Members of the Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge.

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Insolvent subsequent to his insolvency. If the Official Assignee could take the property it would be subject to the same equities which subsisted between the Insolvent and the Respondent.

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Upon the question whether the proceeds of after-acquired goods belonged to the Assignees of an uncertificated Insolvent or to the mortgagee, the following cases were relied on:—*Platel v. Berill* (a), *Jackson v. Burnham* (b), *Ashley v. Kell* (c), *Holsgrave v. Hedges* (d), *Hawker v. Hallewell* (e), *Bailey v. Culverwell* (f), *Yeates v. Groves* (g), *Row v. Dawson* (h), *Langton v. Horton* (i), *Curtis v. Auber* (j), *Tapfrell v. Hillman* (k), *Carvalho v. Burn* (l), *Lempriere v. Pasley* (m), *Everett v. Backhouse* (n), *Belcher v. Oldfield* (o), *In re Atkinson's Trusts* (p), *In re Barr's Trusts* (q), *Winch v. Keeley* (r), *Twiss v. White* (s), *Woodland v. Fuller* (t), *Troughton v. Gitley* (u), *Tucker v. Hernaman* (x).

Mr. Lewis, Q.C., and Mr. W. H. Melvill, for the Respondent.

The principle which concedes to the creditors of an Insolvent, debts contracted in public trade subsequent to his insolvency, a priority of payment out of the profits of such trade, has no application to a debt

- (a) 2 Exch. Rep. 519. (b) 8 Exch. Rep. 173. (c) Stra. 1207.
 (d) 3 Drew, 74. (e) 2 Sm. & Giff. 498. (f) 8 Barn. & Cr. 448.
 (g) 1 Ves. Jun. 280. (h) 1 Ves. 331. (i) 1 Hare, 549.
 (j) 1 Jac. & Wal. 526. (k) 6 Man. & Gr. 245.
 (l) 4 Barn. & Ad. 382. S. C. 1 Ad. & El. 883. 7 Sim. 109.
 (m) 2 Term. Rep. 486. (n) 10 Ves. 94.
 (o) 6 Bingham, N. C. 102. (p) 2 De G. Mac. & Gor. 140.
 (q) 4 Kay & John. 219. (r) 1 Term. Rep. 619.
 (s) 3 Bingham. 486. (t) 3 Per. & D. 570.
 (u) Amb. 630.
 (x) 1 Sm. & Giff. 394. S. C. on appeal, 4 De G. Mac. & Gor. 399.

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BROOKS. contracted in the manner stated in this case. Immediately upon the purchase of the effects in question by the Insolvent, on the 7th of *February*, 1859, the same were vested in the Official Assignee. The subsequent assignment of such effects by the Insolvent to the Appellant could not prejudice or affect the title of the Assignee, as the statutory title of Assignees under insolvency is not subject to any equity arising from dealings of the Insolvent subsequent to the insolvency, except in certain cases in which the fact of the person asserting the equity is shown to have been ignorant of the insolvency. That is the distinguishing ingredient in cases of this kind which is lost sight of by the Appellant. *Exp. Boulton (a)* is a strong case in our favour. There a holder of shares in a Railway Company was one of the secretaries of the Company and a Solicitor. He borrowed money of a client on a deposit of the certificates of the shares, but no further notice of the deposit was given to the Company. The Solicitor became Bankrupt; and it was held by the Lords Justices that the shares were in his order and disposition with the consent of the client. In the present case it cannot be denied that the Appellant was aware of the insolvency at the time of the transaction in question. Such knowledge is fatal to his claim to have a prior lien. Neither can it be urged that there has been any act or default on the part of the Assignee whereby he can be deemed to have waived or lost his right to such effects in priority to the claim of the Appellant.

Next, we submit, that the loan, bond, and mortgage did not form one transaction, or that the parol agreement for a lien at the time of the advance of the

(a) 1 De G. & Jo. 163.

money constituted an equitable lien. The authorities upon this point are conclusive. In *Exp. Coombe* (a), ^{1860.} ^{KERAKOOSE} Sir John Leech says, "A good equitable mortgage ^{21.} ^{BROOKS.} was made by the deposit of the original lease, but the parol agreement to deposit the further lease can give no title." Although it was held by Lord *St. Leonard's*, in *re Atkinson's Trusts* (b), that the title of an equitable assignee for value of an equitable interest is not affected by the previous insolvency of the assignor; yet that case is distinguishable from the present. There the Assignee had no notice of the insolvency. *Exp. Hooper* (c) is an authority, that where there was a mortgage to secure a sum of money, and the mortgagor afterwards entered into a parol engagement that further sums advanced subsequently to the mortgage should be tacked to the original mortgage, and the mortgagor afterwards became a Bankrupt, that a further mortgage was not created on the strength of the parol engagement. [Lord *Chelmsford*: It is impossible that you can split up the transaction or contend that the Assignee is not subject to the same equities as the Insolvent himself.] There may be an equity between the Insolvent and the Appellant, but not necessarily so as against the Assignee. It is necessary to establish that the party dealing with the Insolvent should not have had notice. [Lord *Kingsdown*: If that be so, as you broadly lay down, an Insolvent could deal with nobody.] You must look to the conduct of the party contracting with the Insolvent. If he, knowing the insolvency, supplies him with goods, he gives him a false ground for future credit. But, admitting that the loan, bond,

(a) 4 Madd. 251.

(b) 2 De G. Mac. & Gor. 140.

(c) 19 Ves. 477.

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The Right Hon. Lord KINGSDOWN.

The case rests upon a narrow point. Under the Statute, 11th & 12th *Vict.* c. 21, the Assignee has a right to the subsequently-acquired property of an Insolvent, unless the Insolvent has obtained a certificate and discharge; but the Assignee's right to the subsequently-acquired property is subject to two qualifications. In the first place, if the Insolvent has acquired property subject to liens and obligations, then any property taken by the Assignee under that state of things is taken subject to those charges and equities which affect the property in the hands of the Insolvent. The second qualification is this, that if the Insolvent carries on trade at a subsequent period, with the assent of the Assignee of the estate under the Insolvent Act, in the first instance the property which is acquired in the

subsequent trade will be subject in equity to the charge of the creditors in that trade, in priority to the claim of the Assignee under the first insolvency.

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Now, in this case, when the facts are understood, their Lordships cannot entertain the slightest doubt. It is admitted that what has been done might have been done in such a way as to exempt the property from the claim of the Assignees. Then what is the transaction which takes place? The Insolvent carries on for a certain time the business of a Hotel, as agent or manager for other persons. On the 7th of *February*, 1859, he makes an arrangement with the Appellant, by which he becomes the purchaser of the property now in dispute, and carries on the trade subsequently on his own account, with the knowledge of the Assignee under the insolvency. Under what circumstances, then, does he acquire the property by which the subsequent trade is carried on? Does he acquire an absolute right to it, discharged from any lien, or does he acquire a right to it subject to a legal or equitable title on the part of other persons?

Now, it appears that a sum of money was advanced by the Appellant for the purpose of being laid out in the purchase of the property; and at the time it is advanced, it is advanced subject to an agreement, that it is to be laid out in that particular manner, and that the property is to be assigned to the person who advances the money in order to secure the repayment. A mortgage is executed accordingly. It is one transaction by which the Insolvent never acquired anything except subject to the lien of the creditor, and the Assignee can stand in no better situation.

Their Lordships, therefore, must advise Her Majesty that the judgment of the Court below ought to be reversed, and with costs.

ANUNDMOHUN PAL CHOWDHOORY, }
and others - - - - - } *Appellants,*

AND

KISHEN CHUNDER BANNERJEA }
CHOWDHOORY, and others - } *Respondents.**

*On appeal from the Sudder Dewanny Adawlut at
Calcutta.*

Heard ex-parte.

*Bengal Regulation (XV of 1793), secs. 8 and 9—Contract when bad
under—Usury—What amounts to.*

Money was advanced by A. to B. and others. The repayment, by instalments extending over a period of eleven years, of the principal and interest at 12 per cent. per annum, calculated up to a certain date, was secured by three instruments, consisting of a *Dye Shooder Ijarah* (usufructuary lease), a *Dur Ijarah Kurbooleat* (underlease agreement), and a security bond. A balance being found due on the expiration of the stipulated time for payment, the securities were put in suit, when it was pleaded in defence that the lease and underlease were a fraudulent contrivance to cover illegal interest, and, therefore, void by secs. 8 & 9 of *Ben. Reg. XV. of 1793*. Held in the circumstances, and from the accounts, that the transaction was not a device, or evasion of the law of usury, within that Regulation.

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THIS suit was instituted in the Civil Court of *Zillah Backergunge*, to recover money due to the Appellants on a loan transaction secured by mortgage. The principal questions raised were, first, whether the Respondents had, as they alleged, paid off the loan, and secondly, whether the Respondents had proved that the loan, and the deeds by which its repayment with interest was secured, together constituted a de-

* Present: *Members of the Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Lord Kingsdown, and the Right Hon. Sir Edward Ryan.

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vice, within the meaning of *Ben. Reg. XV.* of 1793, (a) to elude the rules regarding interest, prescribed by that Regulation.

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(a) The following are the sections of *Ben. Reg. XV.* of 1793, bearing upon this point, and referred to on the hearing of the appeal:—

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Sect. II.—*First*: If the cause of action shall have arisen before the 28th day of *March*, 1780, the Courts of Civil Judicature are not to decree higher or lower rates of interest than the following:—

Second: On sums not exceeding one hundred sicca rupees, three rupees and two annas per cent. per mensem, or thirty-seven rupees and eight annas per cent. per annum.

Third: On sums exceeding one hundred sicca rupees two per cent. per mensem, or twenty-four per cent. per annum.

“Sect. IV.—If the cause of action shall have arisen on or after the 1st day of *January*, 1793, the Courts are not to decree any interest on any sum whatever, above the rate of 12 per cent. per annum.

“Sect. VII.—The Courts are not to decree any compound interest arising from intermediate adjustments of accounts. This rule, however, is not to extend to cases in which accounts between the parties shall have been adjusted, and the former bonds or agreements cancelled, and new bonds or agreements taken for the aggregate amount of the principal and the legal interest remaining due upon the adjustment consolidated into principal.

“Sect. VIII.—The Courts are not to decree any interest whatever, in any case, where the bond or instrument given for the security and evidence of the debt shall have been granted on or subsequent to the 28th day of *March*, 1780, and shall specify a higher rate of interest than is authorized by this Regulation to have been given and received subsequent to that date.

“Sect. IX.—Nor to decree any interest whatsoever in favour of the Plaintiff, in any case where the cause of action shall have arisen on or subsequent to the 28th day of *March*, 1780, where a greater interest than is authorized by this Regulation shall have been received, or stipulated to be received, if it be proved that any attempt has been made to elude the rules prescribed in it, by any deduction from the loan, or by any device or means whatever; nor to give any other judgment but for the dismissal of the suit, with costs to be paid by the Plaintiffs.”

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The Civil Court of the *Zillah Backergunge* decided on both questions in favour of the Appellants; declaring, as to the first, that the written receipts put in evidence by the Respondents to prove the payments were fabricated; and, as to the second, that the Respondents had failed to prove that the case was brought within 8th and 9th sections of that Regulation. The *Sudder Dewanny* Court upon appeal reversed the decree of that Court on the second question only, declaring that the case was shown to be within sec. 9 of that Regulation, and dismissed the suit with costs, thereby, in effect, decreeing an entire forfeiture of both the principal and interest due to the Appellants from the Respondents.

The circumstances out of which the suit arose were these:—

On the 15th of October, 1844, *Woomakunt Bannerjea*, since deceased, the father of the second and fourth Respondents, obtained a loan of Rs. 15,000, from the *Chytunno Kishen Pal Chowdhoory*, Banker, also since deceased, and the father of one of the Appellants, named *Ram Kishen Pal Chowdhoory* and *Kally Kishen Pal Chowdhoory*, and uncle of the other Appellants *Anundmohun Pal Chowdhoory*, *Gobind Chunder Pal Chowdhoory*, *Mohesh Chunder Pal Chowdhoory*, and who, together with his sons and nephews, constituted an undivided Hindoo family.

At the time when the money was agreed to be lent it was also agreed, between the borrower and lender, that three several instruments should be executed by *Woomakunt Bannerjea*, in order to secure the repayment, by instalments, extending over a period of eleven years and ten months, of Rs. 15,000,

together with interest thereon at the rate of 12 per cent. per annum.

These instruments were dated 1 *Kartick* 1251 (the 15th of October, 1844), and registered in the District.

The first of these instruments, executed by *Woomakunt Bannerjea* called an *Ijarah Pottah* (instrument of lease), and sometimes a *Dye Shooder Ijarah* (usufructuary lease), was as follows:—

“To *Chytunno Kishen Pal*, son of *Kishen Mungul Pal*, deceased, inhabitant of *Lohojung, Thannah Rajabaree, Zillah Dacca*. This *Ijarah Pottah* is executed by *Woomakunt Bannerjea Chowdhury*, inhabitant of *Kaleepara, Thannah Sreenaggur*, in the above District:—My ancestral *Zemindary, Talook*, and *Howalas*, comprise a one-third of the whole 12-anna share of *Pergunnah Ramnuggur*, bearing a proportionate *Sudder jumma* of Rs. 1,220. 5a. 3p., out of the whole Rs. 3,660. 15a. 9p.; a 4-anna share of the entire 16 annas of *Tuppah Kaderabad*, the proportionate *Sudder jumma* of which is Rs. 240. 11a. 3p., out of the whole Rs. 962. 13a., subordinate to the Collectorate of *Zillah Backergunge*, and in my *Nij* (own) name; *Talook Abdool Momeen*, the collections of which are included in *Zillah Hyderabad*, bearing a *Sudder jumma* of Rs. 3. 4a., and 3p.; *Kharija Chuckla Noorpoor*, the collections of which are realized along with *Zillah Rajnuggur*, and which is named *Howala Atush Khan*, bearing a *Sudder jumma* of Rs. 21. 5a. 4p.; *Howala Anwar Khan*, the *jumma* of which is Rs. 21. 5a. 4p.; and *Howala Sultan Mahomed*, bearing a *Sudder jumma* of Rs. 1. 1a. 1p., subordinate to the Collectorate of *Zillah Dacca*

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Gelalpore; so that in the above two districts my rights bear a total *Sudder jumma* of Company's Rs. 1,508. 6p. The whole of this, I, of my own consent and free will, do farm out to you for a term of 11 years and 10 months from the month of *Kartick*, 1251, to the month of *Sawun*, 1263. The *Mofussil* proceeds of the whole, according to the fixed annual collections, are these:—in *Pergunnah Ramnagore*, *Mouzah Balia*, *Mouzah Barjalia*, and *Jowar Shajeera*, yield Rs. 3,391. 10a. 3p.; *Tuppah Kaderabad*, Rs. 831. 10a.; and *Talook, Abdool Momeen, Howalas Atush Khan, Anwa Khan*, and *Sultan Mahomed*, appertaining to *Kismut Muchooa*, Rs. 107. 12a.; in all, Rs. 4,331. 3p. Deducting from this sum the expense of collections to be incurred by you as heretofore, and the *Chuckran* allowances in money and lands (that is on account of *Pergunnah Ramnuggur*), Rs. 344. 7a. 6p.; *Tuppah Kaderabad*, Rs. 133. 10a. and *Kismut Muchooa*, Rs. 8, amounting in all to Rs. 486. 1a. 6p., there remains Rs. 3,844. 14a. 9p). At this calculation, the *Mofussil* proceeds during the above term, will amount to Rs. 45,498. 4a. 1p.; out of this sum you will make over to me annually the Government revenue for the above term, which, at the above rate (that is, Rs. 1,508. 6p. per annum), amounts to Co.'s Rs. 17,845. 7p. I will pay this sum into the above collectorates. As for the remainder, Co.'s Rs. 27,653. 3a. 6p. which, for the above term, will be due to me from you, I have received from you in cash, from hand to hand, on this day, at *Lahojung*, an advance of Co.'s Rs. 15,000. Instead of repaying this sum, Rs. 15,000, at once, it will be paid by instalments, noted below, within the

above term of the *Ijarah*, 11 years and 10 months; hence, interest on that sum, as per schedule, at the rate of 1 rupee per cent., will, for the above term, amount to Rs. 12,653. 3a. 6p. in all, principal and interest, amounting to Rs. 27,653. 3a. 6p., which will be due to you. You will, therefore, retain the aforesaid *Zemindary*, *Talook* and *Howalas* in your own possession and control for the above term of the *Ijarah*, 11 years and 10 months, collect rents in the *Mofussil*, according to the gross assets, and, after deducting the expenses of collection and the Government revenue, you will take, in liquidation of the above principal and interest, the whole of the above sum of Rs. 27,653. 3a. 6p., which is due to me. I will not, during the term of the *Ijarah*, alienate the property mentioned in this *Pottah*, either by sale or gift. Should the aforesaid *Mehals* be sold for arrears of Government revenue, then, out of the above amount, whatever will remain due to you at that period, after deducting the sums repaid, will be paid, without any objection, by myself and my heirs. In failure of payment, the same will be realized from my other real and personal properties, and no objection, either on my part or on the part of my heirs, will be admitted. The *Sudder* and *Mofussil* expenses and losses, on account of suits relative to the aforesaid *Mehals*, which are now pending, or which will be instituted in future, in the Civil or Criminal Courts, the Collectorate, &c., will be payable by myself, and you have nothing to do with them. Under these terms, and on receipt of Rs. 15,000, do I execute this *Dye Shooder* (usufructuary) *Ijarah* lease, and take a *Kurbooleat*." A schedule showing the instalments payable was annexed.

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The second instrument was executed by the Respondents, *Krishto Chunder Bannerjea Chowdhoory*, on behalf of *Woomakunt Bannerjea*, whose *Gomashtah* he was, called a *Dur Ijarah Kurbooleat* (an under-lease agreement), and which became necessary as it had been agreed between the principal parties, as is usual, that the mortgagee, *Chytunno Kishen Pal Chowdhoory* should not enter into actual possession of the property, or into receipt of the rents, under the *Ijarah Pottah*, but that as lessor under it he would grant (which he did) an underlease to the Respondent, *Kishen Chunder Bannerjea*, as the appointee of *Woomakunt Bannerjea*.

“To *Chytunno Kishen Pal*. You have taken an *Ijarah* lease of the ancestral *Zemindaries*, *Talooks*, and *Howalas* of *Woomakunt Bannerjea Chowdhoory*. Therefore, *Bannerjea Chowdhoory* being security, I do, hereby, of my own accord, take a *Dur Ijarah* from you of the above-mentioned *Mehals* for the said term of 11 years and 10 months, the annual *Mofussil* proceeds of which are, as stated in the *Ijarah* lease, Rs. 3,391. 10a. 3p. in *Mouzah Balia* and *Mouzah Burjalia*, and *Jowar Shajurah*, appertaining to *Pergunnah Ramnuggur*; Rs. 831. 10a. in *Tuppa Kaderabad*, and Rs. 107. 12a. in *Talook Abdool Momeen*; *Howala Atush Khan*, *Anwar Khan*, and *Sultan Mahomed*, appertaining to *Kismut Muchooa*, making a total of Rs. 4,331. 0a. 3p., from which is to be deducted Rs. 486. 1a. 6p., being the collection charges, &c., due to me, as stated in the *Ijarah Pottah*, as well as the *Chuckran* allowances in money and lands, viz., Rs. 344. 7a. 6p. for *Pergunnah Ramnuggur*, Rs. 133. 10a. for *Tuppah Kaderabad*, and Rs. 8 for

Kismut Muchooa, making a total of Rs. 486. 1a. 6p. That, from the remainder of Rs. 3,844. 14a. 9p. per annum, or from the total sum of Rs. 45,498. 4a. 1p., accruing during the said term, I will pay to *Bannerjea Chowdhory*, the proprietors, according to the terms of the *Pottah*, the sum of Rs. 17,845. 0a. 7p., being the total amount of *Sudder jumma* for the term at the rate of Rs. 1,508. 0a. 6p. per annum, as stated above, by whom the same shall be paid into the Collectorates. The remainder, Rs. 27,653. 3a. 6p., which would be due to you for the period, shall be paid to you by me without any objection, according to the undermentioned instalments, and on the following months of each year. Failing to pay any instalment, I will pay interest at one rupee per cent. per month. All profits arising from increase, and losses incurred on account of decrease in the fixed collections of the *Mehals*, caused by inundation, drought, damage, &c., as also all costs of suits pending, or that will hereafter be instituted in the Criminal and Collector's Courts, &c., will go to my account, and you have no concern with them. In case the rents be not paid according to the stated instalments, you will realize them in conformity with the Regulations that are now or will hereafter be in force as regards the collection of rents. I or my heirs are not at liberty to relinquish this *Dur Ijarah* within the aforesaid period." A schedule showing the instalments payable here followed.

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The third and last instrument, called a security bond, was executed by *Woomakunt Bannerjea* in order to guarantee the due performance of the conditions contained in the above *Kurbooleat*.

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After the execution of these instruments *Woomakunt Bannerjea*, and the Respondent *Kishen Chunder Bannerjea*, as such under lessee, were jointly in possession of the land and premises mentioned in the securities.

Woomakunt Bannerjea died in 1845, leaving three sons, the Respondents, *Brojo Chunder Bannerjea*, *Chunder Kunt Bannerjea*, and *Soorjoo Kunt Bannerjea*, his joint heirs him surviving, who accordingly entered into and have since remained in joint possession of the land and premises with the other Respondent, *Kishen Chunder Bannerjea*.

It appeared that between the 16th *Poos* B. E., 1251 (corresponding with the 30th of *December*, 1844), and the 23rd *Maugh* B. E. 1256 (corresponding with the 4th of *February*, 1849), the aggregate sum of Company's Rs. 7,398. 12a. was paid in divers amounts to account of instalments under the securities, partly by the late *Woomakunt Bannerjea*, during his life, and partly by the Respondents since his death, but no further payments were received in respect of the loan.

In consequence thereof, the Appellants, together with one *Mussamant Shukee Monee Chowdhoorane*, since deceased, who had survived *Chytunno Kishen Pal Chowdhoory*, put the securities in suit, and, on the 28th of *February*, 1853, they filed a plaint in the *Zillah* Court of *Backergunge*, which, after setting forth that the loan of Rs. 15,000, and also the other principal facts before mentioned, sought to recover a balance, after crediting the amount so received as aforesaid, of Rs. 18,381. 10a., due from the Defendants at the date of plaint, under the three several instruments,

which were therein relied on, as having been duly executed, to secure the repayment of loan of Rs. 15,000, and interest at 12 per cent. per annum, and in such instalments as aforesaid; and the plaintiff prayed that the sum of Rs. 18,381. 10a., the balance claimed to be due, might be awarded and decreed to be paid from the properties left by *Woomakunt Bannerjea*, in the deeds mentioned in the instruments, and also from the other real and personal properties of the Defendants.

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The joint answer of the Respondents, *Brojo Chunder Bannerjea* and *Chunder Kunt Bannerjea* stated, that the loan of Rs. 15,000, was not paid down in cash on the 1st *Kartick* 1251, but was made up as alleged of a sum of Rs. 11,300, the balance of principal and interest, part of which they submitted was illegal, due from their father, *Woomakunt Bannerjea*, on five several bonds, and of the sum of Rs. 3,700, paid him in cash on the last-mentioned date; that the execution of the lease and sublease was a mere fraudulent contrivance to cover the receipt of illegal interest, the addition of the sum of Rs. 12,653. 3a. 6p. being an illegal anticipation of interest, and the provision as to interest on instalments when over due, being a device to receive compound interest, and that, therefore, the suit ought to be dismissed, even as regarded the small portion of the principal due, with reference to sections 8 and 9 of *Ben. Reg. XV.* of 1793; that the Defendants had repaid, in respect of the loan, the sum of Rs. 17,972. 8a. 8p. for which they held receipts, and a further sum of Rs. 700, for which, as they admitted, they had no written acknowledgment; that the right and interest in the lands mentioned in the instruments

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of mortgage securities were not liable to be sold by auction, or the amount due to be recovered from the same, as the *Mehals* had been alienated.

The replication denied the statements in the answer, and in particular the payments therein alleged were denied. The replication explained that the sum of Rs. 12,653. 3a. 6p., stated to be the total amount of interest, was not interest on the whole principal sum of Rs. 15,000, for the whole term of 11 years and 10 months, but only on the balance from time to time to remain outstanding, supposing each instalment was paid at due date, and that, therefore, if the instalments were not duly paid, the provision in the mortgage securities for the payment of interest thereon was just and legal, and it was denied that any excess of legal interest or compound interest had been received.

The answer of the other Respondent, *Kissen Chunder Bannerjea*, stated that the amount of the liability of *Woomakunt Bannerjea*, together with illegal interest thereon, was determined at Rs. 15,000, and the securities were given to cover that sum with interest; that as he was then *Gomastah* of *Woomakunt Bannerjea*, he signed his name to the sublease as requested by him, but that, with this exception, he had no connection with the debt, or with those instruments, and was not in possession of the property.

An account was filed which showed that the balance of Rs. 18,381. 10a., principal money and interest, sought to be recovered by the plaint, was owing. This account so given in evidence was calculated on this principle. The principal money, beginning with full amount of the original loan, viz. Rs. 15,000, was entered in that account in one column, and simple

interest thereon, accruing, under the agreement, at the rate of 12 per cent. per annum, was separately entered in another column; and the account showed that the sums actually paid from time to time were, as received, applied first to the discharge of the interest accrued due, and, when the amount of any payment was large enough to admit of it, which was only on two occasions, viz. the 15th *Poos*, 1251, and 18th *Poos*, 1252, the surplus was applied in reduction of the principal. The Defendants filed statements of account with the object of making it appear that illegal interest had been charged by the Plaintiffs.

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The Plaintiffs filed, as their evidence, the three several instruments forming the mortgage securities hereinbefore mentioned. Ten witnesses also were examined by them to prove the loan and actual payments by *Kishen Pal Chowdhoory* of the full sum of Rs. 15,000, at the time of the execution of the instruments as well as the due execution of the latter by *Woomakunt Bannerjea* and *Kishen Chunder Bannerjea* respectively, and also that promises of payment of the balance claimed by the Appellants to be due had been made by the Respondents since *Woomakunt Bannerjea*'s death. The Defendants filed five documents purporting to be Bengalee Bonds, and alleged to have been executed by *Woomakunt Bannerjea*, at different dates between the 7th of *February*, 1837, corresponding with the 26th *Maugh*, 1243, B.E. and 24th of *September*, 1844, corresponding with the 9th *Assin*, 1251, B.E., in favour of *Kishen Pal Chowdhoory*, as the lender of the moneys therein respectively mentioned, and which these alleged Bonds purported to cover, in the whole

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the aggregate sum of Rs. 9,700 for principal moneys admitted to have been lent, exclusive of interest, which was conditioned to be paid, on the principal moneys aforesaid, at the rate of 12 per cent. per annum. None of these Bonds had been registered. They also filed certain other documents, five of which purported to be the *suleanas* (yearly receipts), having different dates between 17th of *March*, 1845, corresponding with 5th *Chey*t, 1251, B.E., and 19th of *March*, 1852, corresponding with the 7th *Chey*t, 1258, B.E.; and the remaining fifteen documents, purporting to be the *dakhillas* (receipts), bearing different dates between the 31st of *December*, 1844, corresponding with the 17th *Poos*, 1251, B.E., and the 2nd of *January*, 1852, corresponding with the 19th *Poos*, 1258, B.E. The aggregate amount alleged to be covered by those fifteen documents was Rs. 17,972. 8a. 8p.

None of these alleged *suleanas* and *dakhillas*, it appeared, were written on stamped paper, but they had each been stamped two months subsequent to the date on which the plaint was filed.

Ten witnesses were examined on behalf of the Defendants to establish the *suleanas* and *dakhillas* filed, and these witnesses were also examined to prove that the sum of Rs. 15,000, was not paid in full, but that some part of it was made up of illegal interest charged under a verbal agreement made at the time of the alleged execution of the five several last-mentioned Bonds, and, as it appeared, directly at variance with the condition on the face of them, which provided for the payment of interest at 12 per cent. per annum only.

The hearing of the suit took place before Mr. *Kemp*, the Acting Judge of the *Zillah* Court of *Backergunge*, into which Court the suit had been transferred from the Court of the Principal *Sudder Ameen*.

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The judgment and decree of the Court was pronounced on the 5th of *April*, 1855; the decree after holding that the *suleanas* and *dakhillas* were fabricated, proceeded in these terms:—"The whole drift of the defence is to bring the transaction under the provisions of sec. 9, Reg. XV. of 1793. These provisions are very stringent, and, in my opinion, can only be enforced where the contract is so covert as to be manifestly a device implying trickery. A contract will not be bad under either sec. 8 or 9 of the Usury Regulation, unless there has been a clear attempt to obtain on the whole more than the principal, with legal interest. In the present case there has been no such attempt. The principal in this suit, or Co.'s Rs. 15,000, is stated by the Defendants to be made up of the aggregate of sums due to Plaintiffs on five bonds, interest thereon, and a cash payment. This is denied by the Plaintiffs; but, admitting the statement of the Defendants to be correct, there is nothing illegal in the transaction. To secure the liquidation of the above sum, a *Dye Shooder Ijarah* of certain *Mehals* was granted to *Chytunno Kishen Pal* by the father of the Defendants, Nos. 2 and 3, and the *Mehals* were again sublet to *Omakunt Bannerjea*, the father of the Defendants Nos. 2 and 3, in the name of the Defendant No. 1. The whole of these transactions have been formally registered, and are above suspicion. Moreover, they have been acted upon by the Defendants, who admit that

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they have paid rent, according to the terms of the sub-lease, from 1251 B.S. to 1259 B.S., amounting to no less than Rs. 17,972. 8a. 8p., as per receipts, and Rs. 700 without a receipt. The argument of the Pleader for the Defendants, that anticipation interest has been added to the principal, and that upon the aggregate interest on the lapsed instalments has been charged, will not, if proved, bring the transaction under the operation of section 9; for, as already observed, the Plaintiffs have not attempted to obtain on the whole more than the principal, with legal interest. Let us test this:—the principal is admitted to be Co.'s Rs. 15,000, which was borrowed on the 1st *Kartick*, 1251, payable by *Srabun*, 1263, B.S.; simple interest on the above sum for a period of 11 years and 10 months would be Rs. 21,300. add this to the principal, and the result is Co.'s Rs. 36,300. Now, the *Kistbundi* signed by the sub-lessee, Defendant, No. 1, and the security bond signed by *Omakunt Bannerjea*, father of the Defendants, provides for the payment within the term of lease, or from *Kartick*, 1251, and *Srabun*, 1263, B.S., of the sum of Rs. 27,653. 3a. 6p." The judgment then proceeded:—"I now come to the point whether the Plaintiffs are entitled to recover the amount of their claim from the property pledged by *Omakunt Bannerjea*, the father of the Defendants, 2 and 3, and from any other property, real or personal, possessed by the Defendants. I am of opinion that they are entitled to recover. In the security bond it is stipulated that, until the claim of the Plaintiffs be fully satisfied, the property pledged shall not be either sold or alienated. A further stipulation is made that if this property be not sufficient, all other property,

real or personal, belonging to the security and his heirs, shall be liable. There now remains to be determined to what extent Defendant, No. 1 is liable. This party admits that he took a sub-lease from the Plaintiffs on the security of *Omakunt Bannerjea*, the father of the other Defendants. This party may or may not be *Benamee* for *Omakunt Bannerjea*; he admits taking the lease, and he must be held to be liable. Holding, therefore, that the Plaintiffs' claim does not come under the provisions of sections 8 and 9 of Reg. XV. of 1793; that the Defendants have totally failed to prove that they have paid the sums alleged by them; and that both the property pledged and any or all other property possessed by any or all of the Defendants, is liable to the recovery of the Plaintiffs' claim, it is ordered that the entire claim of Plaintiffs, with interest from date of suit to date of final recovery, and all costs with interest from this date to date of recovery, be decreed against all the Defendants. Let the amount of this decree be recovered from the property pledged and from any other property of the Defendants."

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The Defendants appealed from this decree to the *Sudder Dewanny Adawlut* at *Calcutta*.

The appeal was heard before Messrs. *Raikes*, *Patton*, and *Sconce*, Judges of that Court, and by a decree of the Court, they declared as follows:—"The first issue which we have to hear and decide is, that the transaction founded upon, is an attempt to elude the rule laid down in Reg. XV. of 1793, whereby greater interest than 12 per cent. per annum is prohibited, and that, under section 9 of that law, the suit should be dismissed. *Baboo*

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Ramapershad Roy, (the Pleader for Respondents), said, that in this case there was no device to take excessive and illegal interest, that is a mere matter of calculation. The Judge, whose decision is now before us, says also that there has been no attempt to obtain, on the whole, more than the principal due, with legal interest. To test this, he assumes that simple interest for 11 years and 10 months on Rs. 15,000, would be Rs. 21,300; and he contrasts with that Plaintiffs' claim for interest, Rs. 12,653. 3a. 6p. But the Plaintiffs demand much more than that. They demand not merely the simple interest of Rs. 12,653. 3a. 6p., but, consolidating this with the principal and making one item of Rs. 27,653. 3a. 6p., they claim interest on that from the date of each instalment to the date of liquidation. To show the extent of the Plaintiffs' claim, an account has been taken in this Court. Plaintiffs, in this suit, do not bring their claim for arrears later than the year 1259, in which the suit was instituted; but, for the sake of completeness, we have had an account taken to the final date of liquidation provided in the lease—viz. *Sawan*, 1263; and from this we find that, while simple interest on Rs. 15,000, from *Kartick*, 1251, to *Sawan*, 1263, amounts to Rs. 21,150, the compound interest which the Plaintiffs have stipulated should be paid to them amounts to Rs. 32,432—that is, first, we have the item of Rs. 12,653. 3a. 6p., and, next, the item of Rs. 19,778. 12a. 6p., which, upon all the instalments of Rs. 27,653. 3a. 6p., being unpaid, it is provided should be paid till liquidation. This is exactly the suit which the Plaintiffs now seek to give

effect to. Plaintiffs stop at *Phagoon*, 1259; but, if instead of that date, they had sued at the close of *Sawun*, 1263, upon a principal debt of Rs. 15,000, they would have claimed on their deed, interest amounting to Rs. 32,432. In the suit before us, Plaintiffs represent the principal debt due to the 13th *Pons*, 1259, to be Rs. 19,722, and upon that they claim also interest to the same date, amounting to Rs. 6,057. 12a. 7p. Now this last item is calculated at 12 per cent., and the first item, called principal, comprises only a portion of the original debt, for Rs. 15,000; while all the balance of that sum of Rs. 19,722 is also interest. Not only so, the Plaintiffs admit the receipt of Rs. 7,358. 12a. 6p., of which they apportion Rs. 5,376. 2a. 3p. to principal (meaning thereby both the original debt of Rs. 15,000 and the interest of Rs. 12,653. 3a. 6p. consolidated therewith), and Rs. 2,022. 9a. 9p. to subsequent interest. That this is the exact character of the suit, is no matter of opinion—it is a matter of fact and figures: the transaction which Plaintiffs entered into was clearly a transaction intended to evade the law, and we have no alternative under the law but to dismiss the suit. The Pleader, *Baboo Ramapershad Roy*, has desired to bring the case within the provisions of sec. 7, Reg. XV. of 1793, as if it were a case of adjusted accounts, in which a new engagement had been taken for the aggregate amount of the principal and legal interest remaining due at the date of the adjustment. The present case is of a totally different character—that is, the whole interest set forth was prospective interest, and the engagement was, that it should be levied by a double cal-

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culuation, which we find to largely exceed in amount the rate allowed by law. We reverse the judgment of the Lower Court, and dismiss the suit with costs. Let the Appellants, agreeably to the account prepared by the *Khurchanuvees*, receive from the Plaintiffs (Respondents) costs of this Court, together with interest from this date up to the date of realization; and, for the costs of the *Zillah* Court, let them present a petition there, when the necessary order will be passed in regard to the same, in accordance with the orders contained in the Circular Order, dated the 4th of *March*, 1836.

The appeal was from this decree. No appearances having been put in for the Respondents the appeal was heard *ex parte*.

Mr. *R. Palmer*, Q.C., and Mr. *Leith*, for the Appellants.

This is a security in the ordinary form in *Bengal*. There was no stipulation for usurious interest in the contract, or any condition that the borrower should pay compound interest on the loan. [Lord *Kingsdown*: It is like the purchase of an annuity payable by instalments.] The suit ought not to have been dismissed under the eighth and ninth sections of *Ben. Reg. XV.* of 1793, as the particulars of the transaction of loan were fully, openly, and truthfully set forth on the face of the three registered instruments securing the repayment of the loan. It is clear that the execution of these instruments ought not to have been considered and treated as a device within the meaning of the 9th section to elude the rules as to interest prescribed by that Regulation. *Khedoo Lal*

Khatri v. Ruttan Khatri (a), *Bahoo Sheosuhyeé Lal v. Bahoo Ubheelakh (b)*, *Sheikh Uzhur Ali v. Paluk Shev Lal (c)*. The case of *Wise v. Kishenkoomar Bous(d)*, is distinguishable. That was a shift for usury. The documents were intended to cover a usurious contract. If it was a penalty to pay interest on the non-payment of the instalments the penalty was either good or bad in law; if the former, no question could arise, on the other hand, such penalty, if bad, was distinct from the contract, as shown by these instruments. [Lord *Chelmsford*: If the Respondents had appeared then the whole question of the alleged receipts could have been gone into.] But the decree of the *Sudder Dewanny Adawlut* only finds that compound interest was stipulated for by the parties; and, admitting, for the sake of argument only, that such was necessarily the construction to be put upon these instruments, yet, we contend, that the Court ought merely to have disallowed by their decree such compound interest, as is especially provided for by sec. 7 of the Regulation in question. Lastly, we submit, that sections 4, 7, 8, and 9 of *Ben. Reg. XV.* of 1793, ought to be read and considered together; and we contend that there is nothing contained in these sections, or in any other part of that Regulation, to deprive the Appellants of their remedy, and, as the *Zillah Court* held, that they are entitled to a decree for payment to them of the sum sought in the plaint to be recovered, which sum was shown to be less than the amount of principal money then due in respect of

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(a) 5 Ben. Sud. Dew. Adaw. Reps. 10.

(b) 11 Ben. Sud. Dew. Adaw. Reps. 872.

(c) 10 Ben. Sud. Dew. Adaw. Reps. 459.

(d) 4 Moore's Ind. App. Cases, 201.

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the original loan, together with simple legal interest thereon.

The Right Hon. Lord CHELMSFORD:

Their Lordships are of opinion, that the decree of the *Sudder Dewanny* Court ought to be reversed, and the decree of the *Zillah* Court affirmed, with costs of the Courts below and of the appeal.

MOONSHEE BUZUL-UL-RAHEEM - - Appellant.

AND

LUTEEFUT-OON-NISSA - - - Respondent.*

*On appeal from the Sudder Dewanny Adawlut at
Calcutta.*

*Mahomedan Law—Divorce—Forms and incidents of—Right of wife
to dower—Deed obtained by duress—Validity.*

Provision is made by the Mahomedan law for divorce in either of the two forms. First, *Talak*, and secondly, *Khoola*.

A divorce by *Talak* is the mere arbitrary act of the husband, who may repudiate his wife with, or without cause, but in a divorce of that kind the husband is liable to repay *dyn-mohr*, or the wife's dower, and *Semble*, also to give up her jewels and paraphernalia.

A *Khoola* divorce is with the consent and at the instance of the wife, for which she gives a consideration to her husband for release of the marriage tie.

Non-payment of the consideration-money by the wife does not invalidate such a divorce.

Divorce by *Talak* is not complete and irrevocable by the single declaration of the husband, but a *Khoola* divorce is at once complete and irrevocable from the moment the husband repudiates the wife and a separation takes place.

THIS suit was brought by the Respondent against the Appellant to recover *dyn-mohr* (marriage gift), 17th & 18th
June, 1861.

* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.

Assessor,—The Right Hon. Sir Lawrence Peel.

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Suit by divorced wife against her husband to recover her *dyn-mohr* on the allegation that her husband had dissolved the marriage "by divorcing her," and had obtained from her by force and duress two instruments, first an *Ibranamah*, or release of her *dyn-mohr*, and secondly, a *Khoolanamah*, or deed securing her husband the stipulated consideration to be paid by a wife in a case of *Khoola* divorce. In his answer, the husband denied that a *Talak* divorce had taken place, and in order to bar her claim to dower upon that form of divorce set up the *Ibranamah* and *Khoolanamah*. Held,

First, that as it appeared from the evidence that the deeds were obtained by force and duress, they could not be supported; and,

Secondly, that upon the admission in the answer of a divorce it must be presumed as a fact, that a divorce of some kind had taken place, and that in the circumstances it was a *Talak* and not a *Khoola* divorce, according to which the divorced wife was entitled to recover her *dyn-mohr*.

secured by *Kabeenamah* (deed of marriage settlement), by reason of the divorce of the Respondent from the Appellant.

It appeared from the evidence, in the year 1842, the Appellant, a Mahomedan, married the Respondent. On that occasion a marriage settlement was executed, by which the Appellant settled on the Respondent, by way of dower (*mohr*), Rs. 10,000 and 1,000, gold *mokurs*. That in the early part of the year 1847, the Appellant also married one *Shumsoonissa*, a rich widow. From that time the Appellant did everything he could to get rid of the Respondent; treating her with great harshness, refusing to permit her to see her mother, denying her food and clothing adequate to her station, in the hope of inducing her to ask for a divorce, by which she would forfeit her right in respect of her dower, and to force her to return the marriage settlement, which was at this time deposited with her mother for safe custody. The Respondent complained to her mother of the treatment she met with from her husband, and begged her to return the marriage settlement to him. In consequence of these complaints her mother, in the years 1848, 1849, and 1850 filed petitions in the *Foujdary* Court, complaining of the treatment to

which her daughter was subjected at the hands of the Appellant, and praying the interference of the Court. Under one of these petitions, she obtained an order on the Appellant to allow her to see her daughter. At the interview which ensued, the Appellant, who was present, said to the mother, "I have divorced her (the Respondent); you give up the paper and take away your daughter." The mother refused at this time to give up the marriage settlement; but subsequently, no redress having been obtained by the petitions, on the 24th of *August*, 1850, hearing from her daughter that her condition was becoming more miserable, she sent that document to the Appellant. Having obtained the deed, the Appellant compelled the Respondent to execute an *Ibranamah* and a deed of divorce, after which he turned her out of his house at midnight in a state of insensibility.

In consequence of this treatment the Respondent, on the 7th of *September*, 1850, filed a petition in the *Foujdary* Court, for the production of the deed of divorce and other documents. This petition was dismissed, on the ground that the *Foujdary* Court had no power to make an Order as to their genuineness.

Whereupon the Respondent filed a plaint in *forma pauperis*, in the *Zillah* Court of Twenty-four *Pergunnahs*, against the Appellant, in which she alleged that the Appellant had dissolved the marriage by divorcing her, and she further stated that two instruments by which she was alleged to have given up her *dyn-mohr* were obtained from her by fraud and duress, and by the plaint sought to recover her dower of Rs. 10,000, and 1,000, gold *mohurs*, valued at Rs. 16,000, making in the aggregate Rs. 26,000.

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The Appellant by his answer, denied that he had divorced the Respondent by *Talak*, that she left his house, having subsistence money of her *iddit*; and alleged that she had executed an *Ibranamah*, and had thereby released him from all claims in respect of her dower; and that, on the 24th of *August*, 1850, she had given him a *Khoola* and executed a *Khoolanamah*, by which the claim sought to be enforced by the plaint was barred.

The Respondent, in her replication asserted that the *Ibranamah* set up by the answer was a fabrication, and that the execution of the *Khoolanamah* had been obtained by duress, and she contended, that the Appellant by pleading a *Khoola* divorce had admitted the existence of a divorce, which was *Talak*.

By a proceeding of the Court, under sec. 10, *Ben. Reg.* xxvi. of 1814, the following issues were fixed:—On the perusal of the pleadings the chief points in dispute are these: First, had the Defendant divorced the female Plaintiff or not? Second, had the female Plaintiff, relinquishing her claim to the *Kabeen*, executed or not the *Ibranamah* of the 4th of *Bysack*, 1254, and the *Khoolanamah* of the 9th *Bhadro*, 1257? On the perusal of the replication, and the issues on merits, the issues on law are these:—Although the divorce of the Defendant, and the execution of the *Khoolanamah* by the female Plaintiff be not proved, still the Defendant states that he obtained the *Khoolanamah*. Now, according to Mahomedan law, is it tenable or not as claimed by the female Plaintiff?

Evidence was entered into by both parties, and in support of the plea of the alleged *Ibranamah*, an instrument was put in by the Defendant, purporting to have been executed by the Plaintiff. This instrument, after

reciting that the Plaintiff had for a long time been passing her days in the greatest happiness and pleasure as a wife, and that her husband had in every way shown his love and affection towards her, went on to exonerate him from all liability in respect of her marriage portion, whatever the amount might be. It purported to be witnessed by nine persons, of whom only one, *Ahmed Hosein*, was called as a witness, and he admitted that he himself did not see the document signed by the Plaintiff, but stated that he recognized her by her voice from behind a *pardah* (screen). In support of the *Khoolanamah*, six witnesses were examined by the Defendant, of whom two only, *Syud Mahommud* and *Syud Allee* (*Ameen* of the Defendant's *Mudrissa*), deposed to having seen the Plaintiff execute it. *Syud Mahommud*, however, admitted that he did not know whether the Plaintiff signed it voluntarily or not, and both witnesses were contradicted as to the circumstances of the execution by the statement contained in the *Khoolanamah*.

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The Court directed a *Futwa* by the Mahomedan Law Officer attached to the Court.

The case submitted to the *Moulvie* and his *Futwa* thereon, was as follows:—“*Lutecfut-oon-nissa Beebee* claims her *dyn-mohr* money, stating that *Moonshee Buzul-ul-Raheem* married her on a *dyn-mohr* of the sum of Rs. 10,000, and 1,000, gold *mohurs*, and consummated the marriage, and they lived as husband and wife. Afterwards he, without fault, and without her pleasure, divorced her from himself. Therefore, she prefers the claim to the *dyn-mohr*. *Moonshee Buzul-ul-Raheem* states that he did not divorce her, and did not declare that he had divorced her; but that she had given him a *Khoola*, and executed a *Khoolanamah* ac-

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cordingly. The wife says that the allegation of the *Moonshee* aforesaid, to the effect that he got a *Khoola*, is, conformably to Mahomedan law, a proof of the divorce. Under these circumstances, if the *Talak* and *Khoolanamah* aforesaid are not established, still is the *Moonshee* liable by Mahomedan law for the *dyn-mohr* on his own allegation that he had received a *Khoolanamah*?—“Answer.—The husband’s statement of the *Khoola* taking place, and of the wife’s denial of it, are of two kinds; First, the man claims *Khoola* in this manner, viz. ‘I have entered into a *Khoola* with my wife in lieu of so much property, and she has voluntarily agreed to it; I am, therefore, entitled to that much of the property.’ The wife denies the *Khoola*, and the man is unable to adduce proof of his claim. Under these circumstances, there shall be a divorce inferred in consequence of the husband’s admission, but the claim to the property, that is to say, in lieu of the *Khoola*, shall remain as it was, that is to say, it shall not be proved without the wife’s admission, or testimony of witnesses; because the claim is based on two things; one, *Talak*, which is to be proved by the admission of the husband, since he is competent to make the divorce, and it does not depend on the acknowledgment of the wife; and the other is the wife’s liability to payment of the property in lieu of *Khoola*, which cannot be proved unless the wife has agreed to it. The wife’s agreement, however, is proved either by her own admission, or by evidence of witnesses. The second kind is this: the wife claims from the beginning, saying, ‘My husband has divorced me after consummation of the marriage; I am, therefore, fully entitled to the whole *mohr* and *iddit* allowance.’ The husband in answer, in order to repel the

claim to *mohr* and *iddit* allowance, alleges execution of the *Khoola*, stating that 'The wife has given me a *Khoola*; my liability to her claim of the *mohr* and *iddit* allowance is extinct.' This second kind conforms to the question. The divorce on which the wife claims her *dyn-mohr* is irreversible divorce, and carries with it no property. This divorce, however, if proved, obliges the husband to pay the entire *mohr* and *iddit* allowance. The divorce which is dependent on the *Khoola*, which the man alleges is quite a different one, and this divorce, if proved, extinguishes the *mohr*, as also the stipulation for the *iddit* allowance. Under these circumstances the allegation of *Khoola* which the man makes can never be admission of or submission to the divorce alleged by the wife. So, if the wife's allegation be proved, the husband shall be fully liable for payment of the *mohr* and *iddit* allowance; and if the husband's allegation be proved, in that case the entire *mohr* and *nufka* (maintenance) to which he was liable will become extinct. If the allegation of neither be proved, then the *mohr* shall remain in force as it was, that is to say, it will not be extinguished. The difference between the two kinds is, that in the first kind the husband claims the *Khoola*; and the object of his alleging the *Khoola* is to claim the property in lieu of which divorce is made, and the wife denies this. Since the *Khoola* is the same as that of an irreversible divorce, and, as the husband is competent to give a divorce, therefore, divorce, according to his admission, is established; but as the wife's liability to give property cannot be proved without her consent and acknowledgment, therefore, proof of the wife's liability depends entirely upon her own admission or evidence of witnesses. And, in the second kind, the

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wife claims *mohr* and *iddit* allowance against her husband on the ground of divorce being effected without property, and the husband denies the claim, and in order to render void the wife's claim, alleges that she, of her own accord, has relinquished the marriage and extinguished it, and mentioned this relinquishment as being the *Khoola*. Under this circumstance, although the husband apparently claims the *Khoola*, yet she is the Defendant, and denies it; for the object of the *Khoola* is merely to rebut the claim of the *mohr*, and not to prove any property due by the wife, nor to prove the divorce which is included in the *Khoola*. The allegation of this *Khoola* can never prove the wife's claim, which rests on the *Talak* without property, if the wife's claim, founded on divorce without property, is not proved, and if the husband's allegations of *Khoola* effected in lieu of property be not also proved. In that case, the wife's claim of *dyn-mohr* shall continue in force as before, and the husband's allegation of *Khoola* shall be extinct. As proof of divorce depends on *Khoola* being made, and as it is unnecessary for the husband to prove the divorce, and as he is not also required to prove the *Khoola*, his object being to rebut the claim to the *mohr*, therefore, when *Khoola*, which is the chief thing, is not proved, then *Talak*, which is a branch of it, and is not the object sought for, shall not be established, because neither the husband nor wife claims this divorce. When divorce is not proved, in that case the liability of payment of the whole *mohr* and also the *iddit* allowance on the divorce, shall also not be established."

The cause was heard by the Principal *Sudder Ameen*, (*Baboo Lokenath Bose*) who by his judgment found that

the Respondent had failed to prove a simple divorce (*Talak*). With regard to the *Khoolanamah* and *Ibranamah*, that Judge observed that “after a consideration of all the facts of the case, the Court is convinced that the Defendant having received intelligence that *Shumsoonissa* aforesaid was desirous of entering into *nicka*, and having observed the prospects of her wealth, made known his proposals, when *Shumsoonissa* pleaded that he had a wife, that Defendant having obtained her consent by promising to forsake his wife, afterwards entered upon some oath in her presence regarding a divorce, and was yet under fear lest he should be bound to pay the marriage portion. On this account, having prepared an *Ibranamah* at the time he became at ease and married; that being unable to treat the female Plaintiff as his wife, he consented to give her a divorce, but subsequently a discrepancy of names was known to exist in the *Ibranamah*; that the sight of the rival wife being painful, *Shumsoonissa* aforesaid urged the Defendant to turn her out, but the Defendant had purposed to do so without risk, that is to say, he desired to get back the *Kabeenamah*, and have a *Khoolanamah* written out; that as there were no means of doing so easily he began to torment her gradually, and make her pine under anxiety; that having obliged her mother to return the *Kabeenamah*, he got up a fictitious assembly and invited all great men, and having acted apparently in conformity with Mahomedan law, induced the female Plaintiff to sign, and turned her out of the house at twelve o’clock at night.” The Court further decided, that the *Khoolanamah* and *Ibranamah* had not been established; and, with regard to the issue in law, the Court held, that the Appellant having pleaded a

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Khoola, the Respondent was exonerated from proving a *Talak*, and ordered the Appellant to pay the amount of the Respondent's claim, with interest from the date of the decree up to that of its liquidation.

From this decision the Appellant appealed to the *Sudder Dewanny Adawlut* at *Calcutta*.

In his reasons of appeal, the Appellant insisted that the finding of the Court against the *Khoolanamah* was erroneous, and urged that the Principal *Sudder Ameen* had illegally rejected the *Futwa* of the *Moulvie*, although the opinion agreed with the *Hedaya* and other authorities in Mahomedan law. The Appellant also urged, that inasmuch as the *Talak* divorce by the Appellant, which was relied on by the Respondent, was not proved by the evidence, and as to the *Khoola* and *Khoolanamah* set up by him was also at the same time declared not to have been proved, the Court could not legally decree to the Respondent for the amount of the *mohr*, which was only recoverable on an actual dissolution of the marriage according to Mahomedan law being proved, or on proof of the death of either of the parties.

The *Sudder Dewanny Adawlut* ordered that a *Futwa* should be given by the Mahomedan Law Officer of that Court, on the following case submitted to him:—"The wife sues her husband on allegation of a divorce for her *dyn-mohr* (the marriage portion due), and the husband denying the divorce, in order to bar the marriage portion, pleads a *Khoola* from his wife. By the Mahomedan law, an irreversible divorce is not established, nor is the *Khoola* of the wife. Under these circumstances, is the mere allegation of *Khoola* pleaded by the husband a real divorce sustainable or not; and is the wife entitled to claim the whole of the

marriage portion, the same as would have been the case on proof of the divorce given on the part of the husband?" The *Futwa* given was as follows:—"If the case be such as stated, then, by the mere allegation of *Khoola* on the part of the husband, which is tantamount to a relinquishment of property, the divorce of his wife will be fully established, and the wife will be entitled to demand the whole of the *dyn-mohr* as in the case of a divorce by the husband being proved." The following authorities were referred to by the *Moulvie* in support of the *Futwa*:—The *Fosool Emandee*, pp. 279, 481 (*Calcutta* Edit.); The *Doorool-mokhtar*, and *Tahtanee*, pp. 190-1 (*Egypt*. Edit.).

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The hearing of the appeal by the *Sudder* Court took place before *Abercrombie Dick*, Esq., *Henry T. Raikes*, Esq., and *James Hardwicke Patton*, Esq., the Judges of that Court.

The question as to the effect of pleading *Khoola* by the Appellant was first argued and disposed of by the Court. The material part of the judgment upon that point was in these terms:—"The question before the Court is, whether the mere pleading of a *Khoola* in defence, and inability to prove it, entitles the Plaintiff to claim immediate payment of dower, notwithstanding she has failed to prove such a divorce by her husband as would have entitled her. We are of opinion, that as Defendant has rested his defence on the *Ibranamah* and *Khoolanamah* it has that effect. The plea to exempt from payment of dower in virtue of a *Khoolanamah* is an admission of such a divorce (that is, an irreversible divorce) as entitles a wife to claim immediate payment of dower; and the release from such liability is dependent on proof of the truth of the *Khoolanamah* and the *Ibranamah*, the burden of which

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lies on the Defendant, for it is a special plea. The Appellant's pleaders will, therefore, proceed to show that both those deeds have been duly proved."

The evidence in support of the two instruments, the *Ibranamah* and *Khoolanamah* was then investigated, when the Court finally decreed as follows:—"We are of opinion, after a careful consideration of the evidence adduced, and the circumstantial facts on record in the case, that the evidence for the genuineness of the *Ibranamah* is utterly defective. Only one witness out of seven or eight has been produced to testify to it. It purports to have been executed by Plaintiff under the name of *Wozrut-oon-nissa*, a name she declares she never bore, and there is no proof that she, Plaintiff, was so called. It sets forth that it was given out of love and affection for her husband, yet it bears the same date as his marriage with another lady, who had declared she would not enter his house until Plaintiff was turned out of doors. In short, the terms of the deed, with the reasons for giving it, are altogether irreconcilable with the notorious conduct of the husband to the donor, and the known facts opposed to it. The recital of it in the *Khoolanamah* by no means proves its due execution. The *Khoolanamah* is certainly proved to have been witnessed according to forms prevalent among Mahomedans of rank; but there is a remarkable want of care evident on the part of the respectable witnesses who have testified to it, to ascertain that the act of the lady was free and unrestrained. Finally, the recorded fact that no fewer than six complaints of ill treatment by her husband had been presented to the Magistrate by the Plaintiff, from the date of the alleged *Ibranamah* and the marriage with the second wife to the date of Plaintiff giving up her *Ka-*

beenamah and executing the *Khoolanamah*, is sufficient, together with the other circumstances above alluded to, to satisfy the Court that the execution of the *Khoolanamah* was not a voluntary unrestrained act. It is, therefore, a nullity." The *Sudder* Court by their decree dismissed the appeal with costs.

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The present appeal was from this decree.

Mr. *R. Palmer*, Q.C., and Mr. *Leith*, for the Appellant.

First. By the Mahomedan law a divorce may be obtained in two ways; in the first instance, by a form called *Talak*, and secondly, by what is called *Khoola*. *Hedaya*, Bk. IV. ch. ii. p. 213; *ib.* ch. viii. pp. 314—15. These forms are well known in India. The first is an absolute divorce, at the instance of the husband, without any misbehaviour on the part of the wife, or without assigning any cause. A *Talak* divorce entitles the divorced wife to have returned her marriage portion. *Macnaghten* "On Moohummadan Law," ch. vii. pl. 24, p. 58. It is not so in the second form, which is a conditional divorce. By the *Khoola* form the wife is at liberty, with her husband's consent, to purchase from him her freedom from the bonds of marriage. *Macnaghten* "On Moohummadan Law," ch. vii. pl. 28, p. 60. *Maulvi Abdul Wahab v. Mussumat Hingu* (a). The *Koran*, ch. ii. p. 28 (Edit. 1858), lays it down in express terms that the "wife shall redeem herself," and by releasing parts with her dower. Now, we contend, that as the suit was brought by the Respondent to recover her marriage portion secured by deed, the *onus* of proving the validity of the alleged *Talak* divorce was clearly upon the Respondent. The decrees of the Courts in India have rightly held that she had failed to prove a

(a) 5 Ben. Sud. Dew. Rep. 200.

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Talak divorce on the part of the husband, which was relied upon in her pleadings, as entitling her to sue for her marriage portion provided by the Mahomedan law, and yet, in effect, the Court decree her *dyn-mohr* as if she had proved her alleged *Talak* divorce.

Secondly. We submit that the *Khoolanamah* is sufficiently proved. *Khoola* is only an offer of divorce on certain terms. The *Khoolanamah* is the written contract between the parties for a conditional divorce, desired and to be purchased upon certain conditions by the wife. The inconsistency of the decree appealed from is this, that the Courts have found that this deed, although pleaded by the Appellant, but not proved, yet is to be taken as evidence of a *Talak*, or absolute and unconditional divorce. Now, if the *Khoolanamah* is not proved, there is but one alternative, which is, that there was no divorce at all. In the pleadings the Respondent pleads that her husband divorced her; in the answer that is denied by the Appellant, who pleads that she gave him *Khoola*, which averment of a fact is reasonable, the second marriage being the inducement for the divorce by *Khoola*. There is no authority to be found in the Mahomedan law to show that a *Khoolanamah*, *per se*, is a divorce. Man and wife living separately does not without evidence of a divorce constitute a divorce. *Noorunnissa Begum v. Nawab Syed Mohsin Allee Khan Bahadur* (a). The *Futwa* of the Law Officer of the *Zillah* Court was right (b), and the decrees of the Courts below ought to have been conformable to it.

Lastly. By the admission of the Respondent and the evidence, the execution by her of the *Ibranamah* and *Khoolanamah* were proved. She entirely failed to prove her plea of duress, or that she had been coerced by the Appellant to execute those deeds.

(a) 7 Ben. Sud. Dew. Adaw. Reps. 40.

(b) Ante, 386.

At the conclusion of the Appellant's argument,

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Observed, that their Lordships were agreed that the deeds relied upon by the Appellant could not be supported, and directed the Respondent's Counsel to confine themselves to the question, whether there was anything in the pleadings, or otherwise, not of the *Khoolanamah*, from which the Court could find that a divorce had taken place.

Mr. *Lloyd*, Q. C., and Mr. *L. W. Cave*, for the Respondent.

A *Khoola* divorce is irrevocable, according to the opinion of the *Moulvie* of the Court below, and not conditional, as contended by the Appellant's Counsel. The *Hedaya*, Bk. IV. ch. viii. p. 316. In this case the circumstances show that the divorce was *Talak* at the instance of the husband, and not of the wife. With respect to the pleadings we contend that all that the Respondent pleaded in her plaint was that her husband had divorced her. The general averment of such a fact is compatible with a *Talak* divorce. The *Hedaya*, Bk. IV. ch. ii. p. 213. The Appellant having by his answer pleaded a special divorce, or *Khoola*, at the request of his wife, he must be deemed to admit the fact and condition of a divorce, which relieves the Respondent from the necessity of proving a simple divorce; the consequence, therefore, is, that the Appellant having failed to prove the *Khoola* divorce, is liable to the demand for dower as upon a *Talak* divorce, for it cannot be denied that a divorce has taken place. The *futwa* (a) of the *Moulvie* of the *Sudder* Court supports this construction.

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Judgment was postponed and now delivered by

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This suit was instituted in the Civil Court of the Twenty-four *Pergunnahs* by the Respondent, *Luteefut-oon-Nissa*, suing as a pauper against the Appellant, *Moonshee Buzul-ul-Raheem*, to whom she had been married, to recover her *dyn-mohr*, consisting of the sum of Rs. 10,000 and of 1,000, gold *mohurs* valued at Rs. 16,000, amounting together to Rs. 26,000.

This sum was payable by the Appellant to the Respondent in the event of the dissolution of the marriage, and she alleged in her plaint that the Appellant had dissolved the marriage by divorcing her. She further stated, that two instruments by which she was alleged to have given up her *dyn-mohr* had been obtained from her by the force or fraud of the Appellant, and were of no avail to bar her rights.

The Appellant, in his answer, denied the divorce as stated by the Respondent, but alleged that two instruments, one a *Khoolanamah*, had been executed by her, by which she released her *dyn-mohr*, and which deeds he insisted were binding upon her.

The *Zillah* Judge was of opinion, that no divorce except by *Khoola* had been proved by the Respondent, but he held that the plea of the Appellant admitted a divorce by *Khoola*, and that the instruments set up by him as containing a release of the *dyn-mohr* were fraudulent and void, and that, therefore, the marriage being dissolved, the Respondent was entitled to recover her claim, and he decreed accordingly.

This decision by the *Zillah* Court was confirmed

by the *Sudder*, and from the order of the *Sudder* the present appeal is brought.

Upon the facts, we think, that there is little doubt. The question is mainly one of Mahomedan law, and we should not lightly in such a case disturb the concurrent decision of two Courts. But we are quite satisfied that the decision is conformable both to law and to justice.

It appears that by the Mahomedan law divorce may be made in either of two forms; *Talak* or *Khoola*.

A divorce by *Talak* is the mere arbitrary act of the husband, who may repudiate his wife at his own pleasure, with or without cause. But if he adopts that course he is liable to repay her dowry, or *dyn-mohr*, and, as it seems, to give up any jewels or paraphernalia belonging to her.

A divorce by *Khoola* is a divorce with the consent, and at the instance of the wife, in which she gives or agrees to give a consideration to the husband for her release from the marriage tie. In such a case the terms of the bargain are matter of arrangement between the husband and wife, and the wife may, as the consideration, release her *dyn-mohr* and other rights, or make any other agreement for the benefit of the husband.

It seems, that according to existing usage, a divorce by *Talak* is not complete and irrevocable by a single declaration of the husband: but a divorce by *Khoola* is at once complete and irrevocable from the moment when the husband repudiates the wife and the separation takes place. In these particulars the two modes of divorce differ.

But there is one condition which attends every

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divorce, in whichever way it takes place, namely, that the wife is to remain in seclusion for a period of some months after the divorce, in order that it may be seen whether she is pregnant by her husband, and she is entitled to a sum of money from her husband, called her *iddit*, for her maintenance during this period.

At the hearing of this case, two points were made by the Appellant's Counsel. They insisted, first, that the instruments releasing the Respondent's claim under her settlement were valid; and, secondly, that if the *Khoolanamah* executed by the wife were laid out of the case, there was no evidence at all of divorce, and then the marriage was not shown to be dissolved; that the Respondent could not approbate and reprobate the same deed—insist that it was good for the purpose of establishing a divorce, and bad for the purpose of securing to the husband the price which he was to receive for consenting to it.

This objection, however plausible, is founded on a misconception of the real nature of the divorce. The divorce is the sole act of the husband, though granted at the instance of the wife, and purchased by her. The *Khoolanamah* is a deed securing to the husband the stipulated consideration, but it does not constitute the divorce. It assumes it, and is founded upon it. The divorce is created by the husband's repudiation of the wife, and the consequent separation. The law might have provided that non-payment of the consideration should invalidate the divorce, but it is clear, as well from the opinion of the Law Officers of the Indian Courts, as from the authorities cited at our Bar, that the law is otherwise.

The non-payment by the wife of the consideration

for the divorce no more invalidates the divorce than in England the non-payment of the wife's marriage portion invalidates the marriage.

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In this case the husband, while denying a divorce by *Talak*, not only did not deny but set up a divorce by *Khoola*. He alleged distinctly, in his answer, that the Respondent took from him a *Furuckuttee* (which is a deed of divorcement), that she took from him also the subsistence money of her *iddit*, and gave him a receipt for it, and that she then quitted his house with the assent and under the care of her mother.

That a divorce, therefore, had taken place, was the common case of both parties, and the only question was, whether the husband could insist on receiving the consideration for which he says that he had stipulated.

This must depend on the validity of the deeds which he sets up in bar of the Respondent's demand. The dissolution of the marriage being admitted, it is for the Appellant to make out that the Respondent has given up the rights which *prima facie* result from the dissolution, and upon this part of the case their Lordships have never felt the least doubt.

Two instruments are relied on by the Appellant: one an *Ibranamah*, or instrument by which the wife is made, out of regard and affection for her husband, voluntarily to release to him all claim to her *dyn-mohr*. This instrument purports to have been made on the 16th of April, 1847. It states that the settlement by which the *dyn-mohr* is secured is in the possession, not of the wife, but of her mother; that the wife, therefore, cannot give up the in-

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strument, and is not aware of what the *dyn-mohr* consists.

There is nothing like satisfactory proof that the Respondent ever gave her assent to this deed with a knowledge of its contents, and the admitted facts of the case make it in the highest degree improbable, almost impossible, that she should have done so.

At the time at which this instrument purports to have been made, the husband had married, or was on the point of marrying, a second wife, as by law he was entitled to do. The evidence of one of the witnesses states, that the marriage took place either in *April*, 1847, or in the following *October*; and from the time of the marriage, and indeed from the time when it was decided upon, their Lordships are quite satisfied from the evidence that the Appellant and the Respondent were equally desirous of a divorce. Indeed, it appears that the second wife stipulated as a condition of her consent to the marriage, that her husband should divorce his first wife. He had the power to do so by *Talak*, but this would not answer his purpose; he desired to get rid of his wife, but to retain her dowry, and he prepared this deed in order that, having procured a release of the dowry, he might exercise his power of divorce. The mother of the wife, however, had possession of the settlement and refused to give it up, and it seems to have been thought by the husband that it would be impossible for him to establish the *Ibranamah* unless he could procure a confirmation of it, and a surrender of the settlement by the mother, and a divorce by *Khoola*. For this purpose he had recourse to measures of great cruelty; he refused to permit the mother to

see her daughter, and, by a long series of ill-usage, unless there be much exaggeration in the evidence, injured the health and even endangered the life of the Respondent. The mother, after repeated applications to the *Foujdary* Court for the protection of her daughter, at last yielded, and gave up the settlement; under such circumstances the *Khoolanamah* was obtained, which professed to confirm the *Ibra-namah*.

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The Courts below have most properly held that instruments so obtained can have no legal effect. They can be of no more avail, when used as a defence against the claims of the wife, than they would have had if the husband were suing upon them as Plaintiff to enforce rights secured to him.

Their Lordships are quite satisfied that the judgment complained of is correct, and they will humbly advise Her Majesty to affirm it, with costs.

MYNA BOYEE, and others - - - - - Appellants,

AND

OOTARAM, MYARAM, and TAUKOORAM. - Respondents.*

*On appeal from the Sudder Dewanny Adawlut at
Madras.*

Hindu Law—Applicability—Illegitimate children of Englishman by Hindu wife—If Hindus—Such children if constitute a coparcenary—Illegitimate sons—Right to inherit to collaterals—Hindu Law—Texts—Opinion of Pandits—Conflict between—Duty of Court.

H., an Englishman, had five children by two native Hindoo women, one of whom was of the Brahmin caste, a married woman, though living apart from her husband. The five children were brought up as Hindoos, and lived together as a joint family. *H.* by his Will devised an estate to the five illegitimate children in equal shares: *Held*,

First, that the illegitimate children were to be considered as Hindoos, and their rights governed by that law ;

Second, that being children of a Christian father by different Hindoo mothers, although constituting themselves co-parceners in the enjoyment of the property after the manner of a joint Hindoo family, yet that the partnership so constituted differed from the co-partnership of a joint Hindoo family as defined by the Hindoo law ; and that, at the death of each son, his lineal heirs representing their parent would be entitled to enter into that partnership.

Quaere. Whether such right of inheritance enures to collaterals?

A suit was instituted by one of the illegitimate children against his brothers for partition of the estate left them by *H.* A deed of *Razcenamah* was afterwards entered into by the parties, by which the shares and the amounts to be paid to each were ascertained, and provision made against alienation by sale, mortgage, lease or security of any separate share. *Held*, that this deed did not affect the right which each co-sharer had to alienate by Will.

Where a reference is made by the Court to the Native Law Officers for

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In this appeal the question in issue related to the right of one *Ramaprasad*, the husband of the Appel-

* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.

Assessor,—The Right Hon. Sir Lawrence Peel.

an opinion upon a question which arises in a suit before the Court, the answer to which may bind a right, the question submitted should embrace all the important facts proved or admitted in the suit, which may affect the conclusion : and it is the duty of the Court itself so to frame the question, that the Court may elicit an opinion upon the very facts upon which the legal title depends. If the facts be not ascertained, but stated and disputed, then the question should embrace either view of the facts.

When the opinion given is apparently irreconcilable with the opinions of approved text writers on the Hindoo Law, those who give the opinion should be asked to explain that which appears, *prima facie*, irreconcilable : so that they may show on what ground an apparent exemption from the general law is inferred ; whether on general custom, modifying texts, on local usage, family customs, or other exceptional matter.

If both parties are dissatisfied with a decree of the Court below, a cross appeal is necessary.

An appeal was brought from part of a decree. At the hearing, held, that although the whole decree was not open to the Respondents, who had not appealed, yet, in the circumstances, leave to present a cross appeal ought to be permitted.

The Appellants having waived the formality of lodging a cross appeal, the appeal was heard from the whole decree.

Plaintiff, *Myna Boyee*, an illegitimate son of *George Arthur Hughes*, an Englishman, by a native woman, of the Brahmin caste, a married woman, living apart from her husband, to one-fifth part of the rents and profits of an estate called *Kadalkoody*, to which *Ramaprasad* claimed to be entitled as heir of *Taukooram*, another illegitimate son of the same person.

The facts of the case were these:—

Some time before the year 1841, *Hughes* died, having made a Will, whereby he devised estate of *Kadalkoody* in equal shares to five persons, namely, the above *Taukooram*, and *Ramaprasad*, and also to *Myaram*, *Chundoolaul*, and *Oottaram*, who were three other illegitimate sons of *Hughes* by another native woman.

After the death of *Hughes*, the estate of *Kadalkoody* was held and enjoyed in common by his five children until some time in the year 1841, when *Ramaprasad* brought a suit in the Auxiliary Court of *Tinnevely*, claiming a separation or partition of the one-fifth share of the estate to which he was entitled as a devisee under the Will, and a decree was passed accordingly.

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About this time *Oottaram*, one of the five devisees, died, and after his death his daughters and co-heiresses contracted for the sale of his one-fifth share of the estate to *Chundoolaul*.

In the year 1843, *Taukooram*, *Myaram*, and *Chundoolaul* appealed to the Civil Court of *Tinnevelly* against the decree of the Auxiliary Court, but before the appeal came to a hearing, a *Razeenamah*, or deed of compromise, in the form of a petition to the Court, was entered into between the parties.

This instrument was in these terms: “*Razeenamah* presented by both parties (seven in number) in appeal suit No. 92, of 1843, before the said Court, viz.:—Appellants (1) *Taukooram*, (2) *Myaram*, and (3) *Chundoolaul*. Respondent (4) *Ramaprasad*, and supplemental Defendants (5) *Ganda Boyee* alias *Toolaja Boyee*, (6) *Ganga Boyee*, daughters of *Rama Boyee*, widow of *Oottaram*, and second Defendant in original suit, No. 39, of 1841, on the file of the late Auxiliary Court, and (7) *Tarachund*, guardian to *Ganga Boyee*. In the original suit, wherein the Plaintiff sought to recover from the Defendants as his share one-fifth of the *Paliaput* of *Kadalkoody* referred to in the plaint, a decree was passed as sued for. Dissatisfied with this decision, the Appellants preferred the Appeal above referred to, and, after Answer was filed in the said Appeal, the parties entered into a compromise.” The first portion of the compromise had relation solely to the purchase-money of *Oottaram*’s one-fifth share. The *Razeenamah* then proceeded as follows:—“Of the said *Kadalkoody Paliaput*, the share assigned to the third Appellant by Mr. *Hughes*’s Will is one-fifth, and this added to the one-fifth share purchased

by him as stated above, makes his total share two-fifths of the whole estate. The share assigned to the second Appellant, *Myaram*, under the said Will, is one-fifth, and that left to the first Appellant, *Taukooram*, and the Respondent *Ramaprasad*, by the said instrument, is one-fifth each. Thus, it having been settled that we four should enjoy the said *Zemindary* in five shares, we have entered into the following agreement, viz.—That from *Fusly* 1254, the management of the entire *Zemindary* shall for life be entrusted to one of us four, viz. *Taukooram*, the other three abiding by this arrangement. That the *Paishcush*, amounting to Rs. 4,469, 8a. 0p. per annum, shall be punctually paid by *Taukooram*, from and out of the income of the *Paliaput*, for each *Fusly*; the *Irsal* or remittance being made in the names of us all four. That all the repairs necessary to the *Paliaput* shall be executed by him every year at an annual outlay of Rs. 500, he taking care that the money is properly spent. That of the surplus left of each year's income, after defraying the *Paishcush*, charges of repairs and costs of establishment of that year, *Taukooram* shall pay to *Myaram* and *Chundoolaul*, whatever may fall due to them for their said three shares, as per accounts. That on account of the one-fifth share of *Ramaprasad*, *Taukooram* shall, for his life, pay into the treasury of the Court the fixed sum of Rs. 1,300 a-year, a moiety thereof being payable on the 11th *April*, and the other moiety on the 11th *July*, of each *Fusly*. That *Ramaprasad* or the heirs appointed by him shall receive the said sum from the Court. That should the income of *Ramaprasad's* said one-fifth share for any year exceed the fixed amount above referred to, such excess shall be appropriated by *Taukooram*. That

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should the income of the said share fall short in any year of the fixed sum above referred to, *Taukooram* himself shall make good such deficit. That *Taukooram* shall be entrusted with the title-deeds of the said *Paliaput*, and any sharer shall be at liberty to refer to them whenever he wishes. That should the accounts furnished by the *Ameen* deputed to attach the *Paliaput* exhibit any old balance outstanding for *Fuslies*, 1251 to 1253, during which period the *Paliaput* remained under attachment, *Taukooram* shall recover the same, and pay to *Ramaprasad* his one-fifth share thereof, taking a receipt from him. That the other sharers also shall receive their shares of the said balance in the same manner. That after *Taukooram's* death, *Ramaprasad*, or the heirs appointed by him, shall have the management only of his one-fifth share, subject to profits or loss. That the management of the other four shares shall be entrusted to *Myaram* or *Chundoolaul*, or their heirs or representatives appointed by them. That the *Ryots*, *Kurnums*, servants, &c., of the *Paliaput*, shall pay to the other sharers, when they go to visit the estate, the very same respect that they would show to *Taukooram* or persons entrusted with the management after his lifetime. That the *Paliaput* shall never be divided, but only the income thereof, of which each sharer shall receive and enjoy his share with reference to accounts of income and expenditure. That neither the sharers, nor their heirs nor representatives appointed by them, shall alienate their respective shares by sale, mortgage, lease or security; all such transactions, if effected, being null and void."

This instrument was filed in the Civil Court, and the estate of *Kadalkoody* remained under the manage-

ment of *Taukooram*, in accordance with its provisions, until his death, which occurred on the 21st of *January*, 1852.

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During the lifetime of *Taukooram*, he and *Chundoolaul*, and *Myaram* also, until his death, lived together, as undivided brothers. *Ramaprasad*, on the contrary, was a divided brother, and between him and *Taukooram* it appeared great enmity existed.

Upon the death of *Taukooram*, the management and the absolute beneficial interest in a one-fifth share of the *Kadalkoody* estate, to which alone *Ramaprasad* was entitled under the *Razeenamah*, passed to him, and *Chundoolaul* entered upon the management of the other four-fifths of such estate in accordance with that, and also assumed possession of the property of *Taukooram*, to which, together with any disposable interest of *Taukooram* in the estate, he claimed to be entitled under a Will executed by *Taukooram* on the 16th of *January*, 1852.

In *February*, 1852, *Ramaprasad* made an application under Act, No. 19, of 1841, to the Civil Court of *Tinnevelly*, alleging that he was entitled to succeed, as sole heir of *Taukooram*, to all his property, including his one-fifth share of the *Kadalkoody* estate, and that *Chundoolaul* had assumed wrongful possession of the property, and praying to be put into possession under a summary order of the Court. This application was rejected by the Civil Judge, and *Ramaprasad* was left to the institution of a regular suit to establish his alleged title.

Under these circumstances *Ramaprasad*, in *September*, 1852, instituted a suit against *Chundoolaul* in the *Zillah* Court of *Tinnevelly*, alleging in his plaint that the suit was brought for the recovery of real and per-

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sonal property of the value of Rs. 14,568. 4a. 0p. belonging to his deceased brother, *Taukooram*, and that *Taukooram* died leaving no other heirs but Plaintiff, and that the Defendant in order to get possession of the property had forged a Will, and *Mookternamah* purporting to be executed by *Taukooram* in the Defendant's favor, and praying that the Court would be pleased to pass a decree adjudging to the Plaintiff, amongst other property valued at Rs. 8,000, *Taukooram's* right and title to one-fifth of the income of the *Kadalkoody* Estate.

The Defendant by his answer stated, that the *Razee-namah* provided that after *Taukooram's* death the Plaintiff should be entitled to his own one-fifth share of the *Kadalkoody* estate separately and absolutely, and nothing more, and that the Plaintiff and *Taukooram* were enemies, while the Defendant and *Taukooram* were friends; and that on the 23rd of *March*, 1850, *Taukooram* executed a *Mookternamah*, vesting all his right and interest in the *Kadalkoody* estate after his death in the Defendant, and that on the 16th of *January*, 1852, he executed a Will confirming the *Mookternamah*, and devising and bequeathing other property to the Defendant, whom he appointed sole executor of his Will.

The Court stated that it was desirable, with reference to the terms of the *Razeenamah*, that the heirs of *Myaram* deceased should be made parties to the suit. Accordingly a supplemental plaint was filed, making *Laudebhoy Ammaul*, the widow and alleged sole heiress of *Myaram*, a Defendant.

The pleadings being completed, the Court proceeded to ascertain the issues of law and fact raised therein, and found that there were seven issues, of which the

second, third and fourth issues of fact, were alone material in this appeal. These issues were:—Second, whether the Plaintiff was, as the survivor of two illegitimate sons of a Hindoo woman, heir-at-law to his deceased brother. Third, whether *Taukooram* executed a Will in Defendant's favour under date the 16th of *January*, 1852. Fourth, whether under the *Razeenamah* in appeal suit, No. 92, of 1843, *Myaram* and *Chundoolaul* and their heirs take upon the death of *Taukooram* his one-fifth share of the *Kadalkoody Zemindary* to their own use, or in trust for *Taukooram's* heirs. Upon the above issues, the Court recorded the following points to be established by the parties respectively. Under the third issue, the Defendant was to prove—first point for the Defendant, that the deceased *Taukooram* left a Will on the 16th of *January*, 1852, constituting the Defendant his heir. First point for the Plaintiff—Under the fourth issue the Plaintiff was to put in a copy of the *Razeenamah* in appeal suit No. 92, of 1843.”

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Before any evidence was adduced, the Defendant *Chundoolaul* died, and on the motion of the Plaintiff the suit was revived, and *Oottaram*, *Myaram*, and *Taukooram*, the minor sons of *Chundoolaul*, by their guardian, *Bhavany Prasad*, were made Defendants thereto.

The following question was then submitted by the *Zillah* Court to the Pundit of the *Sudder Dewanny* Court for his opinion: “You are requested to state whether, upon the death of one of two illegitimate sons of a Hindoo woman, the estate of the deceased by law devolves upon the surviving brother,” to which the Pundit returned the following answer. “If the illegitimate sons referred

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to in the question were undivided, the estate of one of them would, after his death, devolve upon the surviving brother. If divided, 'it would go to him' only on failure of the deceased's widow, daughter, or her son, or of the deceased's mother."

The Will alleged to have been executed by *Taukooram* in 1852, and the *Mookternamah* executed by *Taukooram* in 1850, the identity of these documents, and the execution thereof, were deposed to by three of the four attesting witnesses to the Will, and by four of the five attesting witnesses to the *Mookternamah*.

The Judge, Mr. *Woodgate*, pronounced the *Zillah* Court's decree, by which it decided that, in accordance with the opinion of the Pundit, the Plaintiff was the heir of his divided brother, *Taukooram*; that the *Mookternamah* and Will were forgeries, and that the *Razeenamah* did not debar the Plaintiff from succeeding to the share of the *Kadalkoody* estate as next heir to his deceased brother, as that document passed only a right of management, and not a beneficial right or interest in the one-fifth share of *Taukooram*.

Against this decree an appeal was preferred by the guardian of the infant Defendants to the *Sudder Adawlut* at Madras.

On the 27th of November, 1856, the *Sudder* Court, consisting of Messrs. *Anderson* and *Harris*, pronounced the following judgment:—The Court observes that the *Mookternamah* was not registered in the *Zillah* Court, nor was the stamp paper on which it is engrossed purchased by one of the parties to the same, nor did the Defendant act upon that document previous to the death of *Taukooram* as he ought to have done, had it been genuine.

Both it and the Will have been discredited by the Lower Court, and nothing has been advanced in the appeal to lead this Court to consider that the evidence has not been correctly appreciated. As the property was not hereditary, but devised to *Taukooram* by his father, *Hughes*, the former had an undoubted right to devise it by Will; but the Court sees no reason to disturb the judgment of the Lower Court, which has declared the Will and *Mookternamah* not to be genuine documents. The judgment then proceeded, "As regards the right of the Plaintiff to inherit the property of his uterine brother *Taukooram*, the Court is decidedly of opinion that these persons must be looked on as Hindoos, and subject to Hindoo law. The question as to the Hindoo law of the case has been fairly put to the Pundits of the Court, and the Court is of opinion that the Plaintiff has a right to inherit the property of *Taukooram*. The Court, however, find it necessary to modify the award of the Civil Judge as regards the one-fifth share of the *Paliaput* of *Kadalkoody*, regarding which a *Razeenamah* was executed by the parties in settlement of appeal suit, No. 92 of 1843. In that suit, the present Plaintiff sued for a one-fifth share of the above *Zemindary*, and obtained a decree in his favour; this was appealed against, and the above *Razeenamah* was filed in the appeal suit. It must be borne in mind that as the present Plaintiff was Plaintiff also in that suit, it was his rights which were then specially to be settled. Now, in the *Razeenamah*, it is distinctly stated that the above *Zemindary* was never to be divided, nor were the sharers to convey or burden their shares;—a provision was made, not only for the disposal of the property during the life of *Taukooram*,

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but also a distinct arrangement made for its disposal after his death;—the very contingency so provided for has led to the present suit. The provision made for this contingency was, that the Plaintiff, or heirs appointed by him, should be invested with the management of his (Plaintiff's) one-fifth share alone, and that the management of the other four shares should vest in *Myaram* and *Chundoolaul* or their heirs. It is subsequently provided that without ever dividing the *Paliaput*, the profits accruing therefrom for the share of each shall alone be divided and enjoyed according to the amount of profits. During the lifetime of *Taukooram*, the latter was to manage the whole *Zemindary*, and pay annually into Court the sum of Rs. 1,300, as the value of the produce of Plaintiff's one-fifth share; after the death of *Taukooram*, the Plaintiff was himself to manage this one-fifth share, but it was clearly the intent of the *Razee-namah* that the right of the Plaintiff should be confined to the enjoyment of his one-fifth share with the management thereof. The right and title to the management and enjoyment of the profits of the other four shares was clearly vested in the other shareholders. The Court is, therefore, of opinion that the Plaintiff is not entitled to recover the one-fifth share of the *Zemindary* which belonged to *Taukooram*, and they resolve to reverse that part of the decree of the lower Court, which awards that share to the Plaintiff. In other respects the decree of the lower Court is confirmed."

The Plaintiff applied for review of judgment, which the *Sudder* Court admitted.

Ramaprasad, the Plaintiff, died, and the suit was revived by the Appellant, *Myna Boyee*, his widow and

heiress; and *Era Saul*, the executor and devisee, and *Hary Ram*, claiming to be the other devisee of the deceased Plaintiff.

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The application for a review of judgment came on again before the *Sudder* Court, and an Order was made by the Court, on the 12th of *November*, 1857, to the effect that no grounds whatever had been established which would justify the Court in interfering with the judgment already passed in the case. That the Court considered that the arguments used were such as could only be dealt with on a regular appeal from the judgment in question. The Court did not think that they could legally review, or be justified in reviewing, a judgment, because the decision was not that which, perhaps, the present Court would give; and the Court found that the matter in issue had been fully discussed, due consideration given, and that no grounds existed for considering that the merits of the case had not been fully understood, and rejected the application for review, with costs.

The Appellants applied to the *Sudder* Court, for leave to appeal to Her Majesty in Council from so much of the decree of the 27th of *November*, 1856, as declared, that *Ramaprasad* was not entitled to recover the one-fifth of the *Zemindary* which belonged to *Taukooram*, and which reversed that part of the decree of the *Zillah* Court, which awarded the one-fifth share to *Ramaprasad*, and also from the Order passed on the 12th of *November*, 1857. The Court admitted the appeal.

The appeal was argued by

Mr. *Rolt*, Q.C., and Mr. *Ayrton*, for the Appellants, and

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Mr. *R. Palmer*, Q. C., and Mr. *W. H. Melvill*,
 for the Respondents.

A preliminary objection was taken by the Respondents, who submitted that the *Sudder* Court were wrong in admitting the appeal, the value of the matter in dispute being under the sum of Rs. 10,000, and that no special certificate was made on admitting the appeal in accordance with Rule II. of the Order in Council of the 10th of *April*, 1838, so as to preclude the Respondents taking objection as to the value of the matter in dispute in the appeal and the admissibility thereof ; and they further submitted that if the appeal was to be considered as properly admitted, then the whole matter originally in dispute including the question of heirship ought to be open to adjudication at the hearing of the appeal, although no cross appeal had been lodged by the Respondents from that part of the decree.

The Lord Justice TURNER:

As leave has been granted by the Court below, the objection to value of the subject-matter in dispute cannot be sustained, but their Lordships are of opinion, that the question of heirship is not open to the Respondents upon this appeal from the decree of the 27th of *November*, 1856, which decree amounts to a declaration of the Court that the Plaintiff was entitled to inherit the property of *Taukooram* as heir. Their Lordships, however, are of opinion that, under the circumstances of the case the Respondents ought not to be deprived of the opportunity of bringing that question before the Court: and they think, therefore, that as to this particular portion of the decree leave ought to be given to the Respondents to bring that

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point distinctly before the Court by petition for leave to appeal, if the Appellants require a petition of appeal to be lodged. If the Appellants be content to waive the question of form and have a decision of the question upon the merits, in that case their Lordships will consider and dispose of the case as it now stands; but if on the other hand the Appellants adhere to the objection that the question is not open to them before this Court, then the Order will be to give the Respondents liberty to present a petition of appeal confined to this particular point, their Lordships, under the circumstances, thinking it not right now to give the Respondents leave to open the whole of the decree (a).

The Appellants' Counsel stated that they were willing to have the case argued without the necessity of lodging a petition for leave to appeal by the Respondents.

The appeal was then heard upon the whole decree of the *Sudder Dewanny* Court.

It was contended, that the Will and the *Mookternamah*, alleged to have been executed by *Taukooram*, were forgeries.

Upon the question, whether the *Razeeunamah* operated as a partition, it was insisted, that *Ramaprasad* was precluded from claiming, upon the death of *Taukooram*, an interest in any portion of the *Kadalkoody* estate beyond his own one-fifth share. *Strange's* "Hindu Law," Vol. I., p. 201, (2nd Edit.,) was referred to.

As to the inheritance of illegitimate children, *W. H. Macnaghten's* "Principles of Hindu Law," Vol. II. note,

(a) See as to the allowance of a cross appeal, though not applied for in the court below, *Nana Narain Rao v. Hurree Punt Bhao*, 6 Moor's Ind. App. Cases, 464.

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p. 15, was cited ; and, as to the right of a uterine brother to succeed to his deceased brother's estate, *W. H. Macnaghten's* "Principles of Hindu Law," Vol. II., pp. 66-7.

And, as to the power of a Hindoo, to make a Will, *Nagalutchmee Ummal v. Gossoo Nadaraja Chetty*, (a) and the authorities there cited, were relied upon.

2nd Aug.,
 1861.

Their Lordships' judgment was delivered by

The Right Hon. Lord KINGSDOWN.

The facts of this case, so far as they are material to the questions we have to consider, lie in a narrow compass. Mr. *George Arthur Hughes*, an Englishman, living in *India*, had two illegitimate children, named *Ramaprasad* and *Taukooram*, by a native woman, a Hindoo, who appears to have been a married woman, to have deserted her husband, and to have lived in adultery with Mr. *Hughes*. This woman appears to have been originally of one of the privileged classes, and not of the *Soodra* class. Mr. *Hughes* had also three other illegitimate children, *Myaram*, *Chundoolaul*, and *Oottoram*, by another native woman. By his Will he devised the estate of *Kadalkoody* to his five illegitimate children in equal shares; to each a fifth share. The children appear to have been brought up as Hindoos and to have lived at first as an united family, but some time after *Hughes's* death *Ramaprasad*, the original Plaintiff in the suit from which this appeal arises, instituted a suit for partition and obtained a decree accordingly. There was an appeal from this decree, and pending this appeal the parties compromised, and a *Razee-namah*, or deed of compromise, was entered into between them. This deed, to which four of the chil-

(a) 6 Moore's Ind. App. Cases, 309.

dren, one of whom, *Chundoolaul*, had purchased the share of *Oottaram*, the fifth of the children, who had died, after reciting the Will of Mr. *Hughes* and the above-mentioned purchase, proceeded as follows: [His Lordship here read the deed of *Razeenamah*, ante, p. 402.]

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In pursuance of the arrangement made by this deed *Taukooram* had the management of the estate during his life, and paid to *Ramaprasad* the annual sum stipulated for by the deed. On the 21st of *January*, 1852, *Taukooram* died intestate, and without having had issue, and on his death *Chundoolaul* took possession of all his real and personal estate, including his one-fifth part of the *Kadalkoody* estate. The plaint in the suit which has given rise to the appeal before us, was filed on the 18th of *September*, 1852, by *Ramaprasad* claiming as the heir of *Taukooram* against *Chundoolaul* for the recovery of the real and personal estate of *Taukooram*. The Defendant, *Chundoolaul*, by his answer in the suit, amongst other grounds of defence which are not material to be mentioned, stated, that in the partition suit the Plaintiff had declared that he was not related to *Taukooram*; that if they were co-parceners they were so through their father and not through their mother; and that the Hindoo law was not applicable to them. That each of them having received a certain amount of property under Mr. *Hughes's* Will, their interests were distinct, and one of them had nothing to do with another's portion; that was the *status* in which *Ramaprasad* had, in the partition suit, prayed the Court to place him; and that the decree in that cause was that the parties were not amenable to the Hindoo law, and he insisted that in the teeth of these proceedings in the former suit it was not open to the

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Plaintiff to claim *Taukooram's* share of the estate of *Ramaprasad*; he relied also upon the *Razeenamah*, insisting that *Taukooram's* intention that his share of the *Kadalkoody* estate should on his death pass to him, the Defendant, was evident from the fact of that instrument containing a detailed provision that *Taukooram's* share, and the management of the other four shares of the estate, should be held in succession by the Defendant and his heirs, or other persons appointed by him; he also set up a *Mookternamah* and a will alleged to have been made by *Taukooram* in his favour.

The Plaintiff, by his replication, explained the allegations made by him in the partition suit, and denied that they bore any such meaning as was imputed to them by the answer. The rejoinder was a mere recapitulation of the answer.

The only material evidence in the cause was, on the part of the Plaintiff, the *Razeenamah*, and on the part of the Defendant, the *Mookternamah*, and the Will, with the depositions of some witnesses in support of those instruments. There was no evidence as to the Plaintiff's title as heir; but upon this point the following question appears to have been submitted to the Pundit of the Court of *Sudder Adawlut*:—"You are requested to state whether, upon the death of one of two illegitimate sons of a Hindoo woman, the estate of the deceased by law devolves upon the surviving brother?" And to this question the following answer appears to have been returned:—"If the illegitimate sons referred to in the question were undivided, the estate of one of them would, after his death, devolve upon his surviving brother. If divided, it would go to him only on failure of the deceased's widow, daughter, or her son, or of the deceased's mother."

Upon the hearing of the cause in the *Zillah* Court, the Judge was of opinion that the *Mookternamah* and the Will were forgeries, and that the provisions of the *Razeenamah* had reference to the management of the estate, and did not affect the right to it; and resting upon the opinion of the Law Officers, he treated the allegations in the partition suit as irrelevant, and considered the Plaintiff's title as heir to be established. The decree of the *Zillah* Court, therefore, was wholly in favour of the Plaintiff.

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From this decree the heirs of *Chundoolaul*, who had died in the meantime, appealed to the *Sudder Adawlut*; but the Judges of that Court were also of opinion that the *Mookternamah* and the Will were not genuine documents; and as regards the right of the Plaintiff to inherit the property of his uterine brother *Taukooram*, they were of opinion that those persons must be looked upon as Hindoos, and subject to Hindoo law; and the question as to the Hindoo law of the case having, as they thought, been fairly put to the Pundits of the Court, they considered that the Plaintiff had a right to inherit the property of *Taukooram*. They accordingly, by a decree dated the 7th of November, 1856, affirmed the decree so far as respects the estate of *Taukooram* not included in the *Razeenamah*; but as to the one-fifth part of the *Kadalknoody* estate, which was included in the *Razeenamah*, they were of opinion that the intent of that instrument was, that the right of the Plaintiff should be confined to the enjoyment of his own one-fifth share, and the management thereof, and that the right and title to the management and enjoyment of the profits of the other four shares was vested in the

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other shareholders, and they accordingly held that the Plaintiff was not entitled to recover the one-fifth share of the *Kadalkoody* estate, which belonged to *Taukooram*, and reversed that part of the decree which awarded that share to the Plaintiff.

The Plaintiff, however, afterwards obtained, as it would appear *ex parte*, an Order for the case to be reheard, but he died soon after the making of this Order, without having had issue.

By his Will, which appears on these proceedings to have been disputed, he devised the *Kadalkoody* estate to the now Appellants, and appointed two of them to be his executors. They accordingly revived the suit, and the *Sudder Court* having subsequently, by an Order dated the 12th of *November*, 1857, discharged the Order for re-hearing, upon the ground that the case was more proper to be the subject of appeal, they obtained leave to bring, and have accordingly brought, this appeal, which is from so much of the decree of the 7th of *November*, 1856, as reversed the decree of the lower Court, so far as it awarded to the Plaintiff *Taukooram's* share of the *Kadalkoody* estate, and also against the Order of the 12th of *November*, 1857.

With respect to the objection raised by the answer that the Plaintiff, was precluded, by reason of the allegations made by him in the partition suit, their Lordships are of opinion that no weight is due to that objection. The allegations referred to could, at the highest, operate only, under the circumstances of this case, as an admission against title, on a particular view of the legal *status* of the party, in point of law, which, if it were erroneous, ought not to

have bound the party in another suit for a different object, the Court having before it all the facts relating to the true *status*.

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The immediate question raised by this appeal, therefore, is, whether the *Sudder* Court was right in the construction which it put upon the *Razeenamah*. Their Lordships find themselves unable to agree with the *Sudder* Court upon the construction of this deed. The deed had its origin in the partition suit. The result of that suit and of the decree which had been made in it, if carried out, would have been to sever, at all events, one-fifth of the estate, and to destroy, to that extent at least, not only all unity of interest but all power of joint management.

The deed appears to have been framed for the purpose of avoiding these results. It provides that there shall be no sale, mortgage, lease, or security of any separate share ; that, during the life of *Taukooram*, he shall have the management of the whole estate, *Ramaprasad* receiving a fixed income ; and that after his death, *Ramaprasad* shall have the management of his fifth, and the management of the other four-fifths shall be entrusted to *Myaram* or *Chundoolaul*; but these provisions point to management, and to management only. They affect the mode of enjoyment, not the right of property. That right does not appear to be affected by the deed otherwise than by the particular provisions against alienation—provisions which, it is to be observed, are carefully limited by the deed, and do not extend to prevent alienation of devise, for it is plain that the deed contemplates that each co-sharer might devise. It is scarcely possible to suppose that it could be intended that the right to devise should be preserved, but that the right of inheritance

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should be taken away. Failing this argument upon the construction of the *Razeenamah*, the Respondents contended that the title of the Plaintiff was nevertheless defeated by that instrument. They argued that all the illegitimate sons were to be considered, as they were considered, and, as it appears to their Lordships, rightly considered, in the Courts in India, to be Hindoos; and that the sons, except *Ramaprasad*, having continued in common, *Ramaprasad* could not, by the Hindoo law, be entitled to any portion of *Taukooram's* share.

This argument renders it necessary to consider what sort of a partnership was constituted by the actual agreed union of the other sons. They were not an united Hindoo family in the ordinary sense in which that term is used in the text-writers on the Hindoo law; a family of which the father was, in his life-time, the head, and the sons in a sense parceners in birth, by an inchoate though alterable title: but they were sons of a Christian father by different Hindoo mothers, constituting themselves parceners in the enjoyment of their property after the manner of a Hindoo joint family. On the death of each, his lineal heirs, representing their parent, would, by the effect of the agreement, enter into that partnership; collaterals, however, could not so enter by succession, unless the Hindoo law gave, in the case under consideration, a right of inheritance also to collaterals. The parties could not by their agreement give new rights of succession to themselves or their heirs unknown to the law. The law of survivorship, which is the consequence of such a partnership amongst Hindoos, would come in only on failure of the heirs.

A further suggestion was made on this part of the

case, that from the peculiar *status* of the parties it was to be presumed that the intention of the instrument was to bar the State by the arrangement between the parties, *inter se*, as to the enjoyment of the property, but no such intention is to be collected from the instrument, or is disclosed by the evidence; and it may be added that the arrangement for the parties continuing in common would, as already observed, include survivorship, and that it could, therefore, only be on failure of heirs of the last survivor that the claim of the State could arise. The instrument too, in its dealings with the management, contemplates the existence of *heredes facti*, and the parties, therefore, cannot but have been aware that they had in their power the means of protection against any claim of the State. So far, therefore, as the immediate question raised by this appeal is concerned, their Lordships are of opinion that the decree complained of cannot be maintained.

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A further question was also raised on the part of the Respondents, whether the appeal, although from part of the decree only did not open to them, the Respondents, the whole decree. Their Lordships were of opinion that it did not, but they thought that under the circumstances of this case leave should be given to present a cross appeal, and the Appellants not having insisted that the mere form of presenting such an appeal should be gone through, it was agreed that the whole decree should be considered as open.

The whole case as to the *Mookternamah* and the Will, and as to the Plaintiff's title as heir to *Taukkooram*, was thus open to the Respondents. Nothing was said by them as to the *Mookternamah* or the Will, and it is unnecessary, therefore, to refer further to

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those documents, which no doubt were forged. The contention was as to *Ramaprasad's* title as heir. This title appears to have been affirmed by both the Courts in India upon the faith of the opinion given by the Law Officers. It does not appear to have been further investigated or inquired into.

The correctness of this opinion was questioned by the Respondents, who objected to the mode in which the question was submitted to them, but the Court declined to take another opinion, and adopted the opinion of these Officers, apparently without noticing its inconsistency with the ordinary text expositions of the Hindoo law. The question submitted to the Law Officers does not include some important facts which existed in this case. Every such reference in a suit, where it may bind a right, should embrace all important facts proved or admitted in the cause, which may affect the conclusion ; and it is the duty of the Court itself so to frame the questions that they may elicit an opinion upon the very facts on which the legal title depends. If the facts be not ascertained, but stated, and disputed, then the questions should embrace either view of the facts. When the opinion given is apparently irreconcilable with the opinions of approved text-writers, those who give the opinion should be asked further to explain that which appears *prima facie*, thus irreconcilable, so that they may show on what they ground an apparent exception from the general law, whether on general custom modifying texts, on local usage, family customs, or other exceptional matter.

In this case it was very important to point out to the notice of the Law Officers that the mother of the Plaintiff and of his uterine brother was a wife living

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in adultery; originally, as above mentioned, one of the privileged classes; that her sons were adulterous issue; that the property had never been the mother's, but had been bequeathed by the father, an Englishman, to his sons, as his sons, and was meant by him to be a parental provision for his children. It was not referred to the Law Officers to consider whether the inability of the sons to succeed to the father affected their heritable capacity as collaterals *inter se*.

On the terms of the answer, the Law Officers may have considered the case merely as one of succession amongst *Soodras* proper, and may have acted simply on a wider view of the law of succession amongst *Soodras* than the written text authorities afford. They may have viewed it as enlarged by some general custom there prevalent extending the law, according to the principles of the Hindoo law which would support such custom, if in fact such custom has obtained.

It is, however, impossible to treat these sons as the sons of a *Soodra* father; if the Plaintiff and *Taukoo-ram* be viewed as the sons of a *Soodra* mother, still the property never was hers, and their heritable capacity even to property of hers has not been established. If any general usage in this part of India has ripened into a custom having the force of law, that the illegitimate children of a woman pursuing an unchaste course of life, whether married or unmarried, inherit her property, this custom is not in proof.

If amongst *Soodras* proper a course of decisions, or other evidence of the prevalency of a general custom, support a heritable capacity of illegitimate Hindoos beyond that which the writers' text-books establish, these decisions have not been made known, nor has that custom been established. But a title such as the

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present, so wholly irreconcilable with the expositions of any text-writer, and, unsupported by any authority, cannot be established upon the evidence which this case affords. To assume without evidence, on assertion simply, a capacity in the Appellant and his uterine brother to inherit to their mother, and assuming that capacity of lineal inheritance to their mother, thence to derive collateral heirship, *inter se*, to property which never was their mother's, would be at variance with legal principles.

Their Lordships have accordingly felt some difficulty in dealing with this part of the case. On the one hand, they are not prepared to act upon the opinion of the Law Officers given upon an imperfect statement of facts, unsupported by authority, and apparently not easily to be reconciled with the opinions of the text-writers on the Hindoo Law. On the other hand, they do not feel satisfied that the opinion of the Law Officers may not be well founded, more especially with reference to some local custom or usage. They have come to the conclusion, therefore, that the only safe course which can be taken is to remit this question to India for further investigation and consideration.

In the course of the argument on the part of the Respondents, an objection was taken on their behalf to the title of the Appellants as the heirs of *Ramaprasad*, but this objection does not appear to have been entertained or considered by the *Sudder Court*, and their Lordships very much doubt whether it is competent to the Respondents to raise it upon this appeal, having regard to what must have been done in the cause.

Their Lordships, therefore, delivered the foregoing

judgment at the close of the sittings after *Trinity* Term, but they ordered their report to stand over until after the Long vacation, in order that the minutes might be fully considered by their Lordships and by Counsel; and the matter having been again brought before their Lordships on the 26th of *November*, 1861, the following minute was finally settled by their Lordships, with the assent of Counsel on both sides, on the 30th of *November*, 1861:—

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“The Appellants, having by their Counsel consented that the rights of the parties should be considered and dealt with in the same manner as if the Respondents had presented a cross appeal confined to the subject-matter of this appeal, viz., the share of *Taukooram* in the *Kadalkoody* estate, their Lordships humbly recommend to Her Majesty that the decree of the *Sudder* Court of the 27th of *November*, 1856, be reversed, in so far as the same is complained of by the appeal, and that the appeal be dismissed in so far as it complains of the Order of the 12th of *November*, 1857, and that it be declared that the *Razeenamah* in the pleadings mentioned does not prejudice or affect the Appellants’ claim to *Taukooram*’s share of the *Kadalkoody* estate, and that the *Mookternamah* and the Will in the pleadings also mentioned were not genuine instruments; and that it be also declared that the aforesaid reversal of the said decree of the *Sudder* Court shall not in any way prejudice or affect the right of the Respondents to contest the title of *Ramaprasad* as the heir of *Taukooram* to his (*Taukooram*’s) share of the *Kadalkoody* estate upon any other grounds than those above mentioned, nor prejudice any objection which may be now open to the Respondents, and which they may be advised to take, to the title of the

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Appellants as the heirs of *Ramaprasad* to the said share of *Taukooram* in the said *Kadalkoody* estate, and to any application they may be advised to make to the *Sudder* Court respecting the same; and that it be ordered that the *Sudder* Court do make all such further inquiry as may be proper and necessary as to the title of *Ramaprasad* as the heir of *Taukooram* to his (*Taukooram's*) share of the *Kadalkoody* estate, and do proceed in the cause as respects that property according to the result of such inquiry; and that it be further ordered that, if it shall appear that *Ramaprasad* was entitled, as the heir of *Taukooram*, to the said share of the *Kadalkoody* estate, and that the Appellants are entitled thereto in right of *Ramaprasad*, the costs of this appeal be paid by the Respondents, and the whole costs in the *Sudder* Court be also borne by them, except the costs of the application for review, as to which, in that event, there should be no costs; but that, if it shall appear that *Ramaprasad* was not entitled as the heir of *Taukooram*, or that the Appellants are not entitled, in right of *Ramaprasad*, to the said share of the *Kadalkoody* estate, the whole costs of the case in the *Sudder* Court be dealt with as the said Court may direct, and that in that event there be no costs of this appeal."

GEORGE LAMB and JOSIAH PATRICK
Wise - - - - - } *Appellants,*

AND

BEJOY KISHEN DASS, DILLAWUR
ALLEE GHOLAM ENSUFF, and } *Respondents.**
others - - - - - }

*On appeal from the Sudder Dewanny Adawlut at
Calcutta.*

Heard ex-parte.

Execution Sale—Setting aside—Irregularity—Meaning—Affixture of notice on place other than the property proclaimed—If vitiates sale—Objection—When to be taken.

A suit was brought in 1852, to set aside an execution sale made in 1841, on the ground of irregularity in not complying with the provisions of *Ben. Reg. XLV.*, sec. 12, of 1793, for the due publication of the sale. A summary suit, under *Ben. Reg. VII.*, of 1825, sec. 5, had been brought shortly after the date of the sale by the judgment debtor, to set it aside on the ground of inadequacy of the purchase-money, which suit was dismissed. There was no allegation in that suit of any irregularity in the publication of sale. It appeared from the evidence in the suit of 1852, that the notice of sale was affixed at the dwelling-house of the judgment debtor, the place where his rents were paid, but which was not part of the estate sold. It was not pleaded in the suit of 1852, that there was a town or village where the notification could be fixed as required by sec. 12, *Ben. Reg. XLV.* of 1793. The *Sudder Dewanny Court* held, that there had been an irregularity in the publication of the notice of sale, as it was not

This was a suit, in the nature of an action of ejectment, brought in the *Zillah Court of Dacca* by the Respondent, *Bejoy Kishen Dass*, to oust the Appellants,

22nd June,
1861.

* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.

Assessor,—The Right Hon. Sir Lawrence Peel.

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made within the ambit of the estate sold, and set the sale aside on that ground. Upon appeal, held by the Judicial Committee, reversing such decree,

First, that, as it did not appear that there was any town or village within the *Pergunnah* at which the notification required by the provisions of *Ben. Reg. XLV.*, sec. 12, of 1793, could be affixed, there had been no irregularity in posting the notice at the house of the judgment debtor, so as to vitiate the sale, and,

Secondly, that, even if there had been an informality in that respect, it ought to have been objected to in the summary suit brought in 1841, and could not be opened eleven years afterwards.

from the possession of certain landed property, and with that object, to set aside a sale made by public auction to the Appellants, and for mesne profits.

The principal question raised in the suit below and by the appeal was, whether the sale by the Government Collector under an Order of a Civil Judge, in execution of his decree, ought to be set aside eleven years afterwards to the prejudice of the Appellants, the auction purchasers, for an alleged irregularity on the part of that Officer in the mode of publishing the notice of the intended sale, with respect to which alleged irregularity no material deviation from the mode prescribed by *Ben. Reg. LXV.* of 1793, sec. 12, was established by the Respondent, *Bejoy Kishen Dass*, nor was any pecuniary injury to himself shown to have resulted from the sale; and more particularly as the judgment debtor, who had availed himself of the remedy by summary suit given by *Ben. Reg. VII.* of 1825, sec. 5, cl. 2, shortly after the sale, to set aside the sale on the ground of irregularity, did not in that suit complain of the alleged irregularity as to the posting of the notice of sale, the objection urged in the present suit.

The principal facts of the case were as follows:—

The Respondent, *Dillawur Allee Gholam Ensuff*, and others, obtained a decree in the *Zillah Court of Dacca* against the principal Respondent, *Bejoy Kishen Dass*,

and others, and, after having made the usual application for execution of the decree, that Court issued an Order, directing the Government Collector of that *Zillah* to sell a certain share, namely, a 3 annas 18 gundas 3 c. 1 krant, out of a 10 annas 13 gundas 1 c. 1 krant share of *Pergunnah, Ootur Shahpore*, situate in the *Zillah*, belonging to the Respondent, *Bejoy Kishen Dass*, and two of the other Respondents, named *Doyamoyee* and *Moheshurry*, also judgment debtors and co-sharers with him, but excepting the rights of one, *Ram Dass Dutt*, who had previously purchased the interest of *Doyamoyee* in such share.

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The Collector accordingly attached the share, lotted it for sale, and published the usual notice or notification of the intended sale, as required by *Ben. Reg. XLV.* of 1793. This notice, it appeared, was not affixed within the *Mehal* in which the property was situate, but at a place called *Arryhazara*, where the house in which the rents of the judgment debtor, *Bejoy Kishen Dass*, were collected, which house was within the estate sold, and, after some postponements, on the 30th of *January*, 1841, the share was put up to public auction in the *Cutcherry* of the Collector. Appellants purchased the same for the sum of Rs. 2,105. The sale was afterwards confirmed by the Commissioners of Revenue.

In the month of *April*, 1841, *Bejoy Kishen Dass* commenced summary proceedings under *Ben. Reg. VII.* of 1825, sec. 5, cl. 2, to set aside the sale, by filing a petition in the *Zillah* Court of *Dacca* before the Principal *Sudder Ameen*, in which he stated, amongst other things, the postponement of the sale from the 23rd to the 30th of *January*, and the sale to the Appellants on the last-mentioned date, and alleged, that the price fetched at the sale was under the true value of the

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share, with reference to the sums previously bid for it, and further alleged, that if the share had been sold on the 23rd of *January*, a larger sum would have been obtained for it; and prayed on that ground that the sale might be reversed and the share re-sold.

The Principal *Sudder Ameen*, before whom the summary suit was heard, on the 17th of *April*, 1841, ordered, that the sale should be set aside and annulled, and that a re-sale should take place, on the ground of irregularity, as the sale was not made on the day first appointed, and also as the share was, in his opinion, sold for an inadequate price.

The Appellants appealed from this Order to the Civil Court of the *Zillah* of *Dacca*, and the Judge of that Court, Mr. *J. F. G. Cooke*, by a proceeding of that Court, dated the 19th of *May*, 1841, reversed that Order, recording his reasons for so doing, as follows:—"Although the Principal *Sudder Ameen*, on the grounds stated by him, has reversed the sale, it does not appear to me that the sale was made in contravention of the law or established rules; for this reason, that though the sale was made several days subsequent to the date fixed, yet the *kyfeut* that has been recorded on the sale advertisement is not at variance with the established rules, nor are the biddings, made *ab initio*, and the sale which was concluded, incorrect according to the provisions of cl. 2, sec. 8, and cl. 2, sec. 14, *Ben. Reg.* XI. of 1882. It was not proper for the Collector to demand from *Chunder Madhub* the amount which he had bid at the first; for although the above Regulation has reference to arrears of revenue, there is nothing in addition thereto stated in Regulation XLV. of 1793. Under these circumstances, the Order of the Principal *Sudder Ameen*,

setting aside the sale at which the Appellants purchased the property, is not proper; for this reason, the Order of the Principal *Sudder Ameen* being reversed, it is ordered that a copy of this proceeding be forwarded to the Principal *Sudder Ameen*, who is to consider the auction purchase of the Appellants as confirmed, and give intimation thereof to the Collector."

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Bejoy Kishen Dass appealed to the *Sudder Dewanny Adawlut* at *Calcutta*, against this Order, and upon the hearing *Sudder Court* held, that nothing irregular had taken place in respect to the sale, and confirmed the Order appealed from.

The Appellants were put into possession of the share so purchased by them, on the confirmation of the sale by the Commissioners of Revenue, and continued in uninterrupted possession for about eleven years, until the 23rd of *March*, 1852, when the Respondent, *Bejoy Kishen Dass*, alone of the several co-sharers, commenced the suit *in forma pauperis*, out of which this appeal arose, by filing a plaint in the *Zillah Court* of *Dacca* against the Appellants, as auction purchasers, and the decree-holders, and also against his own co-sharers, as Defendants, to set aside the sale to the Appellants, and to obtain possession of his own proportion of the share sold; with mesne profits. The plaint stated, that the sale was illegal, having been made in contravention of the existing laws and practice; and then set forth, in particular, two several alleged irregularities in the conduct of the sale, having reference to the notification and publication thereof:-- First, that the notice of the sale was not published at the locality of the property sold, as prescribed by sec. 12, *Ben. Reg. XLV.* of 1793. Secondly, that the name of one *Shah Newaz Khan*, as a decree-holder,

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was irregularly inserted in the sale notification, instead of the names of the decree-holders; and also that it was published in *Kismut Arryhazara*, which place was included in another *Talook*, *Mahadeb Roy*, instead of at the estate sold; and that for those causes the sale ought to be reversed, agreeably to the provisions of cl. i, sec. 5, *Ben. Reg. VII.* of 1825. The plaint also stated, that the Appellants had been in possession of the estate, and in enjoyment of the profits thereof, since the Order of the Judge of the *Zillah* Court in the summary proceedings, and that the Plaintiff's co-sharers had colluded with him, and, as they had not sued for the reversal of their respective proportions of the share, he had no other alternative but to institute the suit against the auction-purchasers, and the decree-holders.

The Appellants, the principal Defendants, by their answer, set forth the summary proceedings and the decrees of the *Zillah* Court and *Sudder Dewanny Adawlut*, insisting that by the latter decree it had been judicially decreed that there had been no irregularity in the conduct of the sale, according to the rules and practice of those Courts, and it was by the answer pleaded, with reference to the two grounds of irregularity set forth in the plaint, that they were of no avail, because the names of *Dillawur Allee Gholam Ensuff* and others, were written in the place of the decree-holders in the notification, which was duly published at the Plaintiff's house at *Arryhazara*, in which was the principal collection *Cutcherry* (office) of the estate sold, and which being the fact, the sale could not on that account be considered to have been illegally held, especially as the Plaintiff urged no objection as regarded the publication of the notification in the summary petition which he

presented for the reversal of the sale. The answer also asserted the regularity of the Collector's proceedings in postponing and adjourning the sale from day to day, and referred to a Circular Order of the *Sudder Dewanny Adawlut* of the 17th of *July*, 1846, to show that the Collector's proceedings were in accordance with what is stated in that Circular Order as the established practice; the answer moreover stated, that on the day of sale the property was publicly bid for and sold at the *Cutcherry*, in the presence of many people, and the Appellants purchased it in consequence of no other person having bid higher; and they submitted that, in such a case, the allegation that the property was sold at an inadequate price could not be a ground for the reversal of the sale.

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The Plaintiff filed documentary proofs. Amongst these was a copy of the report of the *Nazir* of the Collectorate, dated the 15th of *January*, 1841, which stated that he had published two notifications of the sale through the *Peon* at *Kismut Arryha-zara*, where the above property was situate, and that he had submitted to the Collector, the *Peon's* return and *sooruthals* (certificates) of certain persons resident in the neighbourhood of the publication of the notification. The return of the *Peon* who served these notifications was also put in evidence and which was as follows:—"Two notifications were delivered to me. No person on the part of the decree-holder having pointed out the locality of *Talooka Kashee Ram Rae*, but having pointed out *Kismut Arryha-zara* as the locality of the aforesaid *Talook* and *Zemindary*, the notification was published in the house of debtors (*Bejoy Kishen* and others, judgment debtors aforesaid, having been previously mentioned in this return), in the presence of

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Kawul Kishen Shaha. Kishen Chowkeedar, and others, inhabitants of Arryhazara, and I have brought up a sooruthal of the said persons.” The Appellants’ witnesses proved that the principal *Cutcherry* for the collection of the rents of the share of the Respondent, *Bejoy Kishen Dass*, was in his own dwelling-house, at the time when the sale notification of the share was there published by the *Peon* of the Collectorate. No evidence was offered by the Respondent to contradict the facts proved by the Appellants, that the notification of the then intended sale was in due time published at his own dwelling-house, being the office also for the collection of the rents of his share, or to show that he had not notice of such intended sale ; or that he had ever at any time objected to such publication, or had done otherwise in respect thereof than acquiesce in the propriety of the publication up to the time of filing his plaint, eleven years after the sale.

The hearing of the suit took place before the Principal *Sudder Ameen* of the *Zillah* of *Dacca*, and on the 6th of *February*, 1854, he pronounced his decree, in which, after disposing of the two first issues, by declaring that they do not operate as a bar to the suit, he decreed against the claim of the Respondent, as follows:—“In the trial of the third issue it is held, that although it has appeared that the Plaintiff has stated several objections as regards the incorrectness of the sale, yet not one is worthy of credence ; because the first objection is, that in contravention of section 12, Regulation XLV. of 1793, the sale notification was not published at the estate to be sold. Now, it is no secret, that the object of publishing the notification at the property to be sold is,

that the proprietors of and persons connected with the property put up for sale may come to the knowledge of the sale ; and this object is attained by the publication of the notification at a place where many persons of that locality collect, such, for instance, as the principal village *Cutcherry, Bazar, &c.* In section 8, Act IV. of 1846 (which has been enacted in elucidation of the aforesaid section 12), it is enacted, that the sale notification is to be published at a conspicuous place on the property, attached or contiguous to it: therefore, without doubt, by the term, 'principal village,' as stated in section 12 aforesaid, is meant such a locality of the land to be sold where many people reside ; and from copy of the report of *Bungo Chunder Bose, Nazir* of the Collectorate, dated the 15th of *January, 1841*, it is clear, that the sale notification was published at the house of the Plaintiff, the proprietor of the property to be sold, and hung up at the *Thannah* of *Roopgunge* ; and from the evidence of six of the witnesses of the Defendants, it is established, that the Plaintiff's house was close to the collection *Cutcherry* of the estate to be sold ; therefore, in my judgment, according to the intent of that section, the publication of the notification at the collection *Cutcherry* of the Plaintiff's dwelling-house was sufficient. This view is supported by the *Sudder Dewanny* report, dated the 7th of *July, 1853*, in the case of *Eknatoos Panioty v. Shepherd*, in which it was held, that the publication of the notification at the debtor's house is to be considered sufficient. The other objection is, that in place of the names of the decree-holders, the name of *Shah Newaz Khan* was inserted in the sale notification ; but looking at the copy of the notification, the name of *Shah Newaz*

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Khan does not appear ; rather it is evident from the report and proceeding of the Collector, dated the 30th of *January*, 1841, that the names of the decree-holders were written in the original notification, and that the sale in the case of the execution of the decree of the decree-holders was conducted with great regularity: therefore, this decree must be adjudged to be entirely false. The third objection is, that the Collector not having made the sale on the 23rd of *January*, 1841, the date fixed, sold the property on the 30th of *January*, or seven days afterwards, in contravention of law. Now, on looking at the copies of the notification and the proceeding of the Collector, it appears, that for want of time the sale was not made by him on the 23rd of *January*, but that he recorded a *kyfent* of the cause of each day's postponement on the back of the sale notification, as prescribed by the sale laws, and held the sale on the 30th of *January* : therefore, this objection is considered groundless, as the Plaintiff has not submitted any reason to prove the illegality of the sale. The fourth objection is, that in contravention of section 13, Regulation XLV. of 1793, the estate was re-sold, without the publication of a fresh notification, on the 30th of *January*. On looking at the section aforesaid, it appears, that in the event of the auction purchaser not depositing the earnest-money, the sale is to be made *ab initio* ; but the Plaintiff has submitted no precedent to prove that the words *ab initio*, as stated in the aforesaid section, means the publication of a fresh notification. It is ordained in section 5, Act IV. of 1846, which explains the aforesaid section 13, that in the event of the earnest-money not being paid, the property is to be forthwith re-sold: therefore, the words, *ab initio*, used

in sec. 13, and in lieu of which the word 'forthwith' is inserted in section 5 aforesaid, means that the first sale is to be held as never having taken place, and having had no existence ; and a second sale is to be held according to the injunction in the said first notification, in the same way as if the property were sold for the first time ; and, in the said second sale, all the compliances of a first sale are to be carried into effect. Besides, the orders for attachment and publication of the sale notification are passed prior to the sale, and not subsequent to it. Objections fifth, sixth, and seventh, relating to the property having been sold at an inadequate price, and to the Collector having rejected the petition of the decree-holders to stop the sale, are considered worthless, as they do not in any way show cause for the sale being invalid, because by no law can inadequacy of price be considered a cause for rendering a sale incorrect ; and without an Order from the Civil Court the Collector had no power to stop the sale, so that his rejection of the decree-holders' petition could afford no ground for holding the sale irregular. In short, there do not appear to be any grounds for saying that there was any irregularity in the sale ; and this action seems to be improper, and instituted for the purpose of giving trouble, because, from the commencement, *i.e.* from the attachment and sale, the Plaintiff has instituted several summary suits, and afterwards instituted an action on a *kubala* through *Radha Kishore*, claiming on it the reversal of the sale, and which he maintained up to the *Sudder Dewanny* ; and after that this worthless plaint is brought in *forma pauperis*, for the purpose of ruining the decree-holders, and harassing the auction-purchasers." And it was accordingly ordered, that the suit be dismissed.

The Respondent, *Bejoy Kishen Dass*, appealed to

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the *Sudder Dewanny Adawlut* at *Calcutta* from this decree.

The appeal was heard before Messrs. *Raikes*, *Colvin*, and *Sconce*. The Judges differed in opinion. Messrs. *Raikes* and *Colvin* were of opinion, that the decree of the Court below ought to be reversed and the sale annulled. Their recorded judgment was as follows:—
 “It is admitted by both parties that the sale notice was published by affixing it to the Plaintiff’s house at *Arryhazara*; the points for determination are, whether *Arryhazara*, the village where Plaintiff has his dwelling-house, is within the property advertized for sale, and if not, whether the publication of the notice at that place fulfils the requirements of the law, as held to be the case by the Lower Court. We observe that it was clearly and distinctly averred by the Plaintiff, in his plaint, that the notice was not published on the spot, as required by section 12, *Ben. Reg. XLV.* of 1793, but at the village of *Arryhazara*, in *Talook, Mahadeb Roy*; it is also shown by the return of the *Peon* who affixed the notice of sale at the residence of the Plaintiff, that the notice was served in that manner, while the Defendants have not in their answer alleged, that *Arryhazara* is within the precincts of the *Mehal*, but have contended for the legality of the publication, as having been made at the dwelling-house of the Plaintiff, where the collecting *Cutcherry* was also situated. It has, however, been urged in this Court that the *Mehal* sold consisted of a fractional portion of *Pergunnah, Oottur Shahpore*, within which *Pergunnah, Arryhazara* is situated, and that it is consequently a village of the *Mehal* sold, and service of notice at that place was, therefore, a sufficient service to protect the sale. It has been, however, explained, and the explanation

stands uncontradicted, that the *Mehal* advertized for sale is called *Duftera Lukheenarian* and *Kishenram Roy*, consisting of 10 *annas* 13 *gundas* 1 *couree* and 1 *krant* of *Pergunnah*, *Oottur Shahpore*, and that the remaining portion of the *Pergunnah* constitutes a distinct and separate *Mehal* under the name of *Talook, Mahadeb Roy*, within which, and not within *Duftera Lukheenarian* and *Kishenram Roy*, the village of *Arryhazara* lies. The return of the *Peon* who served the notice distinctly states that, as no one on the part of the decree-holder pointed out to him the locality of *Talook, Kishenram Roy*, he affixed it at the residence of the debtors in *Arryhazara, Talook Mahadeb Roy*. Now, it is clearly incumbent on the Defendants to deny or to controvert this part of the case, whereas they have not attempted to meet Plaintiff's averments, further than by tendering evidence to show that the collecting *Cutcherry* of the Plaintiff was held at the place where he resided, and by pleading that the publication of the notice at that place met all the requirements of the law. We must, therefore, hold the finding of the Lower Court to be that the notice was published at the dwelling-house of the Plaintiff, and that as the *Cutcherry* of the Plaintiff was at or contiguous to their house, the publicity thereby given to the sale advertisement was equally as effective as if the notice had been published on some spot within the *Mehal*, and the requirement of the law, therefore, fully accomplished. The law, however, see sec. 12, Reg. XLV. of 1793, under which process of sale was held, in this instance admits of no such lax interpretation. It provides, that publication of the notice shall be made at 'the principal town or village in the lands to be sold,' and although we are of opinion,

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that the length of time which has elapsed since the sale was made would fairly entitle the Defendants to be relieved from the burthen of proving that the place selected for publishing the notice was 'the principal town or village in the lands sold,' we do not think we can pass over the fact made evident in this case that the place of publication was not in the lands at all, or judicially determine that some other kind of notice was substituted for that specified and directed by the law. We must, therefore, in conformity with former precedents (see the case of *Ranee Moradun, v. Mussumat Roop Kowur*, 3rd October, 1844, Vol. VII., p. 184, Select Reports, and case of *Brijlol Oopadhya*, Petitioner, 1st August, 1850, Summary Reports, and without reference to the lapse of time, Plaintiff being within the period allowed by law, hold that the informal publication of the notice vitiates the sale and renders it necessary that we should reverse the judgment of the Lower Court, and cancel the sale. It is, therefore, ordered, that the judgment of the Principal *Sudder Ameen* be reversed, and the sale annulled. Let possession be decreed to the Appellant on depositing the amount of purchase-money, without interest, within the period of one year from this date ; but in consideration of the time, nearly twelve years, which elapsed before bringing the suit, the purchasers will not be called upon to account for (see case of *Musst Ram Mulla* and others, Appellants, v. *Mohummud Idarak* and others, Respondents, decided 4th September, 1850) *wasilat* during his possession previous to date of suit. Let the Appellant receive from the Defendants, who are the Respondents, the costs of this Court, according to the account prepared by the *khurchanuvees*, together with interest

thereon from this date to the date of realization; and for the costs incurred in the *Zillah*, and let a petition be preferred to the *Zillah* Court, from whence an Order will be passed for payment agreeably to the purport of the Circular Order, dated the 4th *March*, 1836."

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The dissentient Judge, Mr. *A. Sconce*, stated the grounds of his difference of opinion with the majority of the Court, and of his reasons that the decree of the *Zillah* Court ought to have been affirmed, in these terms:—"It is with very great difficulty that I form a definite opinion upon the point now before us. We are required by the Plaintiff, whose suit was instituted in *March*, 1852, to set aside an execution sale made on the 30th of *January*, 1841, and the first ground set forth by the Plaintiff for quashing the sale is, that the publication of the intended sale had not been made, as provided by sec. 12, Reg. XLV. of 1793, in the principal town or village in the lands to be sold. So far as we can judge of the facts from the evidence submitted to us, it appears that notification of the sale was published in *Mouzah, Arryhazara*; that this village did not form part of the estate sold, but that as the residence of the judgment debtor and the *Cutcherry* at which, by his tenantry, his rents were paid to him, were situated within this village, the requisitions of the law were presumed to be complied with by notifying the intended sale there. Reg. XLV. of 1793, declares what forms should be followed previous to sale, but it does not contain any provision for setting aside sales on the ground of informality. The only assistance furnished in our law for the determination of such questions when they should arise is cl. i., sec. 5, Reg. VII. of 1825. A doubt had arisen, whether illegal sales

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could be summarily annulled by the Civil Courts without a regular suit, and accordingly by this Regulation it was provided, that if within one month after the sale any material deviation from the mode of sale prescribed by the Regulation was brought before the Court ordering the sale, it was competent to that authority to declare the sale to be null and void. Here then the rule for the Courts to follow in discussing alleged irregularities in the sale proceedings, is to determine whether or not the deviation alleged to have occurred be a material deviation from the mode of sale laid down in the law. It is not only a deviation, but a material deviation, that by Regulation VII. of 1825 our Courts are required to look to, and I apprehend that the fair construction of these words is, that the irregularity in each case complained of should be shown to have materially, or, as I would understand, prejudicially affected the completed sale. It may be said, that such a construction of the law is too indeterminate, and furnishes no definite rule of action for the disposal of such cases as the present; but it seems to be the manifest purpose of the law not to declare absolutely that the omission of any one form constituted an illegal sale, but to leave it for the Courts to consider in each case whether or not the non-compliance with any specific form was a material evasion of the law. In this case, as I have said, the suit was instituted more than eleven years after the sale objected to occurred. So far the Plaintiff may not unjustly be held not to have considered the asserted flaw to have been material to his interests, or he would have asserted it sooner. Besides, though the Plaintiff did by summary petition in the *Zillah* and in the *Sudder* Court contest the

validity of the sale immediately on its completion, he took no objection to the *Mofussil* notification. Here, again, I conclude, is evidence that the Plaintiff was not conscious that any material defect in the sale had arisen from an inexact service of the notification at his place of business. And, further, though I am far from arguing that it is competent to Officers effecting sales to substitute forms for those laid down in the law, we have in this case evidence that there was no intention to evade the law, as, both at the Plaintiff's residence and at the police *Thannah*, notifications of the intended sale were published. I observe, that on the 26th of *May*, 1853, on the appeal of *Hur-rosoondree* and others, a case was decided in this Court in which the non-compliance with the forms laid down in sec. 12, Reg. XLV. of 1793, was also pleaded. By this law, notification of the sales was required to be taken in the office of the Secretary of the Board of Revenue, and in that case the plea was taken that no such notification had been made. It was held, however, that as the Commissioners of Revenue, appointed under Reg. I. of 1829, had succeeded to the powers of the Board of Revenue (with certain restrictions), it was not to be presumed, with reference to the peculiar constitution of the Commissioners' Office, that notifications necessary to be made in the Board's Office should, instead thereof, be made in the Commissioners'. The appeal decided in 1853 differs from the present; but so much is inferable from that decision, that the Courts are competent to determine that the omission to comply with the whole forms prescribed by sec. 12, Reg. XLV. of 1793, does not necessarily import such an illegality as compels them to set aside sales, in concluding which the

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omission may have occurred. Upon the whole, then, I am not satisfied that the Appellant has shown that he is entitled to the relief claimed upon the informality referred to."

By the final decree of the majority of the Court it was ordered, that the judgment of the Principal *Sudder Ameen* be reversed, and possession decreed, without mesne profits, to the Respondent, *Bejoy Kishen Dass*, on depositing the amount of purchase-money, without interest, and that the Appellants should pay the costs, with interest from the date of their decree.

The present appeal was from this decree.

As the Respondent did not appear the appeal was heard *ex-parte*.

Mr. *R. Palmer*, Q.C., (with whom was Mr. *Leith*) for the Appellants.

It is submitted that this decree cannot be upheld. First, the publication of the notification of the intended sale substantially complied with the requirements of *Ben. Reg. XLV. of 1793, sec. 12*. The rents were collected and paid into the judgment debtors' *Cutcherry* at *Arryhazara*, the village at which the notice was affixed. No town or village was proved in the evidence to be on the land sold. Now, the Act, No. IV. of 1846, sec. 8, supplies the defect in *Ben. Reg. LXV. sec. 12*, upon this point, by inserting the words, "town or village," which is "nearest the land to be sold." The cases relied upon by the *Sudder Court* of *Ranee Moradun v. Mussumat Roop Kowur* (a), and *Mussamat Ram Mulla v. Mohammud Idrak* (b), do not, there-

(a) 7 Ben. Sud. Dew. Rep. 184.

(b) 13 Ben. Sud. Dew. Rep. 462.

fore, apply. There is no provision in the Regulations declaring a sale by public auction in execution of a decree, null and void, or liable to be set aside, in consequence of any irregularity on the part of the Government Collector or his subordinate Officer in the publication of the notification of the intended sale. Secondly, the Respondent elected to take his remedy under the summary suit given by *Ben. Reg. VII. of 1825*, sec. 5, cl. 1, to set aside such sale, and it ought to have been satisfactorily established by the Respondent, that the irregularity complained of in the present suit, involved a "material deviation" in the mode prescribed by the Regulations for publishing an intended sale, which was not done. There is no allegation in the plaint that there was any other town or place where the notification ought to have been made. The Plaintiff failed altogether to establish that fact; but the circumstances detailed, and the conduct of the Respondent with respect to his former summary suit, and his other proceedings before the Collector, has the effect of waiving or curing the irregularity, if any existed, in the publication of the notice of the intended sale now complained of. Another objection is, that his conduct showed that he acquiesced in the mode of publishing the notice, adopted, under the circumstances, by the subordinate Officers of the Collector, as shown by their reports and returns made and filed at the time in the Collectorate. Lastly, the Appellants, *bona fide* purchasers for valuable consideration, at the sale by the Collector, have been in possession for eleven years under that sale; and even if the Respondent had proved any injury or damage to him, by reason of the alleged irregularity on the part

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of that Officer, which, however, he did not attempt to do, his remedy in law would have been against that person, and not against the Appellants.

Their Lordships, without calling upon Mr. *Leith*, pronounced judgment, as follows, by

The Right Hon. Lord KINGSDOWN:—

We consider the decree of the Court below erroneous.

It has not been made out to our satisfaction that there was any town or village within the *Per-gunnah* at which notice could have been given. The notification posted at the principal Respondent's house does not, in our opinion, constitute a material irregularity with the provisions of the Regulation cited before us; at all events, if there was an irregularity, it ought to have been brought before the Court below at the time of the summary suit and taken advantage of then. The judgment appealed from must be reversed.

GOLAUB KOONWURREE BEBEE - - - - Appellant,
 AND
 ESHAN CHUNDER CHOWDHOREE,
 and others - - - - Respondents.*

*On appeal from the Sudder Dewanny Adawlut at
 Calcutta.*

Heard ex-parte.

*Hindu law—Will—Construction—Power of executor to charge the
 estate—Guardian—Debt incurred by—Ratification by minor after coming
 of age—Effect.*

A Hindoo Testator, by his Will empowered his Executor and guardian of his infant children, who was also manager of his *Zemindary*, to charge the same for payment of debts and advances during his children's minority, and directed that when the children came of age they should repay the amount raised. The Executor borrowed of a Banking firm money for payment of Government revenue, and gave Bonds charging the *Zemindary* with the sums so borrowed. On the children coming of age they executed a *Kistbundy* for repayment by instalments, of the amount then due. This instrument they afterwards repudiated, and on a suit being brought against them by the lender upon the *Kistbundy*, in defence they not only denied the existence of the Bond, but charged the lender with fraudulently colluding with the Executor in obtaining the loan, and granting a lease to a nominee of the lender at an inadequate rent. Held,—

First, that the Executor had power under the Will to charge the *Zemindary* with advances made for the purposes of the *Zemindary*.

Secondly, that, as a question of fact, the *Kistbundy* was established.

Thirdly, that the remedy of the Defendants was to have instituted a suit against their guardian for an account, charging collusion between him and the lender, so as to investigate the transactions which had taken place and ascertain what was the amount due.

THE Appellant in this case brought an action to recover the sum of Rs. 25,119 5 a. 3 p., the amount of principal and interest due on a *Kistbundy*, or instalment bond. 22nd June,
1861.

* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.

Assessor,—The Right Hon. Sir Lawrence Peel.

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The facts of the case were as follows:—

The late *Anund Chunder Chowdhoree*, a Hindoo inhabitant of *Futtehpoore*, in the Province of *Bengal*, *Zemindar* of a 3-annas share of *Chuckla Futtehpoore*, in *Zillah, Rungpoore*, left six sons, minors, of whom the Respondents were the survivors (the others having died minors and unmarried), having first made a Will, whereby he appointed *Hurrokant Bhuttacharjee*, his spiritual guide, since deceased, the sole Executor and trustee, as well as appointing him manager of his *Zemindary*, until the Testator's sons should attain majority, when he directed all his real and personal estate to be equally divided among them. The Will also contained the following direction:—"If, in the event of a deficiency of money on any account, and incurring of loan, according to occasions be necessary, you will, according to custom, borrow from creditors, which will be repaid from the profits of the *Zemindary*. If this be not done, and the minors become of age, then those sons of mine shall repay the debts of the creditors; and on their failure to do so the same shall be realized from the said estates."

Hurrokant Bhuttacharjee accordingly took upon himself the execution of the trusts of the Will, as Executor, and entered upon and took the sole management of the Testator's *Zemindary*, and, in *March*, 1848, finding the collections of rent insufficient to supply the whole amount then payable to Government for revenue on account of the *Zemindary*, borrowed the sum of Rs. 2,937 from a *Kotee* or banking-house carried on for the benefit of the Appellant, which sum he applied in payment of the Government revenue. He afterwards borrowed from the Appellant three other sums of money, under similar circumstances, and for

the same object, amounting in the whole to the sum of Rs. 16,444. 8a. For these respective sums eight *Tumsooks* (bonds) were severally duly executed by the Executor to secure the repayment of these principal moneys and interest.

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The Respondents attained their majority in 1851, when they entered into possession of the *Zemindary*, when the Appellant demanded payment of the amount due; and, in the month of *July*, 1861, an adjustment of accounts took place, when the sum of Rs. 22,294. 10 a. 11 p. was found to be due from them to the Appellant for principal and interest for the moneys so advanced.

The Respondents being unable to pay the whole amount at once, it was agreed, that they should pay down Rs. 294. 10 a. 11 p., and grant the Appellant a *Kistbundy* (instalment bond) to secure the balance, with interest. Accordingly, on the last-mentioned date, a bond was executed by the Respondents respectively, in favour of the Appellant. This instrument recited the facts above mentioned, including the borrowing of the several sums, and the execution of the bonds, and the amount of the balance of principal and interest found due on the adjustment of the accounts as aforesaid. The *Kistbundy* then provided for the payment of the same by the Respondents, together with interest at 12 per cent. per annum, by instalments, in various fixed amounts, and at various fixed dates in each year between the year 1258 B.E. (1851—1852 A.D.), and the year 1272 B.E. (1866—67), both inclusive; and the *Kistbundy* then declared, that if four successive instalments should be in arrear, the Appellant was empowered to realize at once the whole sum then remaining due,

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with interest. The *Kistbundy* concluded with a clause hypothecating the *Zemindary* and other immovable property of the Respondents, to secure the repayment of the moneys, with interest.

This instrument was registered in the public register office for deeds in the *Zillah, Rungpore*, by *Juggurnath Sircar*, the *Mookter*, under a *Mookternamah*, or power of attorney, signed by the Respondents for that purpose. The *Mookternamah* recited the execution by them of the *Kistbundy*, to secure the amount due under the documents granted by the Executor on account of payments made in respect of the Government revenue payable on the *Zemindary*.

The Respondents paid to the Appellant, on account of principal and interest under the *Kistbundy*, in various amounts and at various dates, in conformity with the requirements of the deed in that behalf, the sum of Rs. 800, on account of principal, and Rs. 600, on account of interest. The Respondents, however, having made default, and more than four of the instalments of the *Kistbundy* having fallen into arrear, the Appellant brought an action against the Respondents in the Civil Court of *Zillah, Rungpore*. The plaint, after stating in detail the facts above mentioned, stated and charged that, after crediting and deducting the part payments aforesaid, the Respondents were indebted, on the day previously to the date of the plaint, the sum of Rs. 21,200, on account of the whole balance of the principal, and Rs. 3915. 5 a. and 3 p. on account of interest, making together the aggregate sum of Rs. 25,119. 5 a. 3 p., the amount she sought to recover by her suit.

The answer of the two first of the Respondents stated, that the third Respondent, *Hurro Chunder Chowdhooree*, had gone on a pilgrimage before the

commencement of the suit, and had not then returned. The answer then charged, that the claim of the Appellant, as well as the grounds and statements thereof, were all invalid, for that neither was any money due by them, nor had they ever executed any *Kistbundy* for the same; and that the Appellant had fabricated that deed. The answer admitted the registration of the *Kistbundy*, but endeavoured to throw suspicion upon it by alleging, that the *Mookter* who presented it for registration was a stranger to the Respondents. The answer then stated, that the Executor had held the collection office for the rents of the *Zemindary* in the Appellant's *Kotee*, or banking house at *Rungpore*, from the year 1255 B.E. (1848-9 A.D.), when the Respondents reached their majority; that the Appellant's cash-keeper, *Hurree Pershad Tewarree*, made collections, and performed other affairs of their *Zemindary*, receiving a salary of Rs. 10 monthly in the name of his son; and that after the payment of the Government revenue and other expenses, the amount of profit used to be kept in deposit in this Appellant's *Kotee*; that no loans were contracted on account of the Government revenue, the *Zemindary*, as they alleged, having returned a large profit, and there being, therefore, no necessity to borrow money either before or after their father's death; and that either the Executor was acting in collusion with the Appellant, or the Appellant without his knowledge appropriated the surplus profit, and prepared the false *Tumsooks* or bonds, and the *Kistbundy*, and had, four months after the death of the Executor, brought the present action. The answer further stated, that the Appellant had, in collusion with the Executor, obtained a farming lease

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of the *Zemindary*, in the name of the cash-keeper, *Hurree Pershad Tewarree*, at a very low rent, from the year 1258 to 1266 B.E.

The replication charged, that by large outgoings, some of which were especially referred to, the Executor and trustee was under the necessity of borrowing the moneys in question from the Appellant's *Kotee*, for the payment of the Government revenue; and submitted, that under the Will the Executor and trustee was empowered to borrow the moneys, and that the Respondents, after attaining majority, were bound to pay the same; and that, on their failing to do so, the same was to be realized from the *Zemindary*, on which the moneys borrowed were a charge; and it was averred, that the statement as to the lease of the *Zemindary* was false, and that the Appellant never took the *Zemindary* under lease, nor advised any other person to do so.

A great many witnesses were examined, the nature and effect of whose evidence is stated in the judgment of the *Sudder Ameen*.

The hearing of the suit took place before the Principal *Sudder Ameen* (*Sreejoot Nuzeerooddeen Mahomed*), who pronounced a decree in favour of the claim of the Appellant, as follows:—"First: From the depositions of *Juggunnath Sircar* and the Defendants' relation, *Hurro Gobind Sen*, whom the Defendants have admitted in their answer to be another *Mookter* of theirs, as well from the depositions of the witnesses to the *Kistbundy* in question, viz. *Bahadoor Singh*, *Boid Nath Tewarree*, *Ram Nath Doss*, and *Lalla Hurruck Chand*, tenants of the Defendants, and also from the evidence of the other witnesses, *Lokenath Sircar*, *Dwarka Nath Dass*, and

others, it has been satisfactorily proved, that the Defendants executed the *Kistbundy* aforesaid under their respective signatures, in consideration of the aforesaid sum borrowed by their Executor, as well as the amount which the Plaintiff paid on account of Defendants' debts, and also the amount which they had borrowed themselves, together with interest thereon, after deduction of the amount repaid, and gave a special *Mookternamah* in the names of their *Mookters*, *Juggunnath Sircar*, *Roy Gobind Dutt*, and *Hurro Gobind Sen*, in order to get the *Kistbundy* registered; that they got the *Mookternamah* attested through another *Mookter* of theirs, *Kandoora*, and by the evidence of the witnesses thereof, viz. *Hurruck Chundro* and *Russool Mahomed*, who are their tenants and dependants, that they got the *Kistbundy* registered through their tenant and *Mookter*, *Juggunnath Sircar*, one of the *Mookters* mentioned in the *Mookternamah*. The writer of the *Kistbundy*, *Deb Nath Banerjea*, who is a servant of the Defendants, has declared that it was he who wrote the *Kistbundy*. From the copy which the Plaintiff has produced of the *Mookternamah*, dated the 16th *Bysack*, 1259 Bengalee year, bearing the signatures of the Defendants, filed in the settlement case brought in the Collectorate, it appears that *Juggunnath Sircar*, who got the *Kistbundy* registered, was the Defendants' *Mookter*, in conjunction with the individual whom the Defendants have admitted in their answer to be their *Mookter*, and also in conjunction with their maternal uncle, *Roy Gobind Dutt*, and others. From copy of the *Mookternamah*, dated 10th *Bhadon*, 1258 Bengalee year, bearing the Defendants' signature, it appears that *Kandoora*, who had produced the *Mook-*

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ternamah to get the *Kistbundy* registered, was the Defendants' appointed *Mookter* in conjunction with their beforementioned other *Mookter*. From the copy of the *Mookternamah* dated the 23rd *Maugh*, 1257 Bengalee year, bearing the Defendants' signatures, it appears that *Lalla Hurruck Chand Doss* was a witness of the *Mookternamah*, regarding the registration of the Defendants' names, and had given his evidence. Hence the Defendants' plea that the said individuals, though composed of their tenants, old servants, and relations, are strangers, appears to be false and untrue. That the sum of Rs. 16,444. 8a. mentioned in the eight bonds, bearing the signature of the Defendants' Executor, filed by the Plaintiff, was paid on account of the Government revenue of the Defendants' *Zemindary* from the year 1254 up to 1257 Bengalee year, is satisfactorily proved from the Collector's attested copies, filed by the Plaintiff, of the twenty-two *chellans*, etc., bearing the signature of their (Defendants') Executor, in which *chellans* that sum is stated to have been borrowed from and paid into the Collectorate through the Plaintiff's *Kotee*. That the Plaintiff's *Mookter* paid Rs. 2,950, on account of the Government revenue of the Defendants' *Zemindary* for the Bengalee year 1257 is satisfactorily proved from the *dakhilla* bearing the seal and signature of the Collector, given in the name of the Plaintiff's servant, with a mention of payment being made through the Plaintiff's *Kotee*, and also from the copy of the Petition which the *Mookter*, *Roy Gobind Dutt*, had filed in the name of the Executor by his own pen, admitting that the sum (Rs. 2,950) was paid by the Plaintiff's servant, and these facts have been corroborated by the Plaintiff's *khattah*

which have been produced and duly proved, and wherein it is mentioned that the aforesaid sums are due by the Defendants, but nothing is due to them. The Defendants cannot bring any objection to this. That the Defendants borrowed Rs. 350, by giving *rookha* (note), as mentioned in the *Kistbundy*, has not been proved like the above. From the copy which the Plaintiff has filed of the *Wuseeutnamah*, which the Defendant's father executed in the name of their Executor, *Hurrokant Bhattacharjee*, it appears that the Executor was authorized to contract loans, and that the liability of the loans contracted by him would attach to the Defendants as well as to their *Zemindary*. Such being the case, the Defendants' plea that the Executor was not authorized to contract loans appears to be utterly false. When the *Kistbundy* and its registration have been proved by the Defendants' relations, servants, and others, as well as by other witnesses, and when it has been proved that the amounts mentioned in the *Kistbundy* have been paid on account of the Government revenue of the Defendants' *Zemindary*, and that they (the Defendants) are liable to pay the debts contracted by their Executor, then there is no doubt that the Defendants are liable to pay the disputed money. The Defendants' servant, *Deb Nath Bondopadhyas*, the writer of the *Kistbundy*, states, that he went to some other place after he had written the *Kistbundy*, and did not see the Defendants put their signatures on the same. The witness, *Emamdee*, states, that the *Kistbundy* was executed, but he did not see the Defendants put their signatures on the same. The Defendants' tenant, *Nara Dinuftery*, who is one of the subscribing witnesses to the *Kistbundy*, states that he did not witness

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the *Kistbundy*. These statements appear to have been made by the influence of the Defendants. When it is considered how the Defendants have stated themselves to be unaware of the terms of the *Wuseent-namah*, and unacquainted with their own servants and others so well known to them, then I cannot convince myself that any one of their statements is true. The Defendants' plea that the witnesses of the *Kistbundy* are low people and the Plaintiff's servants, can be of no consequence, when it has been satisfactorily proved, as stated above by the evidence of their (the Defendants') relations, &c., that the amount of the *Kistbundy* was paid into the Collectorate on account of the Government revenue due by the Defendants, and that the Defendants made over (to the Plaintiff) the *Kistbundy*, after getting it registered by the Register of Deeds through their *Mookters*, servants, tenants, and others. Secondly. The Defendants plead, that their Executor had held the collection-office of their *Zemindary* in Plaintiff's *Kotee*; that the amount of collections of their *Zemindary* used to be deposited at first in the Plaintiff's *Kotee*, and then out of the same the Government revenue of it used to be paid; that their Executor and the Plaintiff, being in collusion with each other, appropriated to their own use the profits of the *Zemindary*, and gave rise to these frauds; and that if an account be made up and a balance-sheet drawn up with reference to real *khattas* of the Plaintiff's *Kotee*, it will appear that nothing is due by them. They have also filed 146 *chellans*, signed by the *Putwarrees* of their *Zemindary*, and given evidence of the six witnesses, who are their *Tehsildars*, and others, in support of their pleas. These proofs cannot vitiate this claim, brought

on the registered *Kistbundy*, which is based on the *dakhillas*, &c., of the Collectorate, and the bonds executed by the Executor, the validity of which has been proved, as stated in the first branch of this decision. The Defendants' witnesses state, that the Executor had appointed one *Hurree Pershad Tewarree*, a servant of the Plaintiff's *Kotee*, in the office of superintendant, and, therefore, the amounts of the collections of rents used to be sent to him agreeably to the direction of the Executor. This circumstance cannot prove that the Plaintiff made the collections of rents agreeably to her own request. If the Defendants' Executor have practised any fraud, still no investigation with regard to the same can take place in this suit, which is brought on a *Kistbundy* given in consideration of former debts, bonds, &c., nor can any adjustment of accounts of the collections of rents made at the Plaintiff's *Kotee* be made in this suit. If it be taken for granted that there was no need for the Executor to contract loans by giving bonds, owing to the amounts of the collections of rents of the Defendants' *Zemindary* having remained deposited, and that the Executor has practised frauds, yet another suit is necessary to investigate the loss incurred by the Defendants by their Executor's fraud. When there is no doubt that the aforesaid amount of loan was paid on account of the Government revenue due by the Defendants, and when it has been satisfactorily proved that the Defendants executed to the Plaintiff the *Kistbundy* in consideration of the same, then, agreeably to the decision of the *Sudder Dewanny Adawlut*, dated 3rd of *February*, 1853, in the case of *Mohataboo*, Appellant, as well as that dated 26th *July* of that year, in the case of

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Prosunno Singh, it is not necessary to hold an investigation with regard to the former accounts. Lastly, there is no proof relative to the Rs. 350, but I am of opinion, that no more proof than the above is necessary in order to prove that sum, when it has been proved as required by law that the Defendants executed the *Kistbundy*, admitting the same to be their debt. The four instalments of the *Kistbundy* having fallen due, the Plaintiff is competent to sue for all the instalments agreeably to its terms, as is apparent. Out of the witnesses mentioned in the second *isemnovesee* filed by the Defendants, two were cited by both parties, and their depositions taken down. The Defendants prayed for the issue of a subpoena for the attendance of the remaining witnesses. It appears that the Defendants have made this prayer with no other view than to waste time uselessly. The Defendants have already given the evidence of many witnesses, which, however, has proved of no advantage to them with regard to the point respecting which they wish to give the evidence of the remaining witnesses. The copy filed by the Plaintiff of the *Wuseeutnamah* executed by the Defendants' father appears to have been obtained on a stamp-paper worth eight annas. This is not a principal document in the case, but merely one in support of it. Therefore, it is not illegal to have taken it on a stamp-paper worth eight annas. It is, therefore, ordered, that this case be decreed, that the Plaintiff's principal amount, as well as interest thereon, agreeably to law, and all costs of Court, together with interest on the aggregate amount of the money from this day till the day of realization, be awarded to the Plaintiff against the mortgaged property."

The Respondents appealed from this decree to the *Sudder Dewanny Adawlut* at *Calcutta*.

The appeal was heard before Messrs. *Colvin*, *Sconce*, and *Dick*, when the two first-mentioned Judges, being the majority of the Court, by their judgment, decreed that the decree of the Lower Court should be reversed, with costs both of the *Zillah* and *Sudder* Court.

The judgment of Messrs. *Colvin* and *Sconce* was as follows:—"We are of opinion, that in a case of this kind, where a deed is said to have been formally executed in adjustment of previous accounts, some evidence should have been afforded of the fact of their settlement, and that a deed professing to be recognition of their settlement should be duly attested. But it does not appear from the evidence that such settlement took place when the *Kistbundy* was said to have been prepared, and the attestation of the deed by witnesses, two only of whom out of seven signed for themselves, is far from satisfactory proof of its execution. The writer of the deed also says that he wrote it by desire of the late guardian of the Appellants, without their sanction, and that he did not see them sign. Moreover, the execution of the power of attorney by the Appellants, to register the *Kistbundy*, is very insufficiently established. The chief witness, *Juggunnath Sircar*, says it was brought to him as coming from them, and he acted upon it, and only afterwards was informed by them that they agreed to it; and it was more necessary to have the power duly proved, as the *Mookternamah* for registry was not executed till two months, viz., on the 18th *Bhaadoon*, 1258, after the date of *Kistbundy*, viz. 17th *Assar* preceding. The argument of the Respondent as to the existence of the old Bonds executed by the

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guardian, and the payment of revenue through her, prove nothing in support of the *Kistbundy*, upon execution of which by Appellants, and not upon the acts of the guardian, the suit is founded."

The dissentient Judge, Mr. *Dick*, recorded his judgment in these terms:—"The Plaintiff in this case sues the Defendants on an instalment-bond for recovery of money lent on seven or eight bonds, and to an Executor of their father's Will, during their minority, for the purpose of paying up the revenue of their estates, and a small sum borrowed by themselves on note of hand after becoming of age. In proof of the claim they produce the subscribing and other witnesses to testify to the due execution of the instalment-bond, and file the deed; they file also the seven or eight bonds with the signature of the Executor, and the note of hand of the Defendants, and documents from the Collectorate, showing the sums to have been paid up through the Plaintiff's banking concern for revenue of Defendants' estates. The Defendants deny the claim altogether, and rest their defence mainly on the improbability of their giving such a deed so soon after coming of age, when, too, they were disputing with a servant of the Plaintiff's banking concern about a farming lease purporting to have been given by the Executor for nine years, a short time before the expiration of their minority; on no accounts having been produced at the time the deed was executed; and on the want of respectability of the subscribing witnesses to it. The Plaintiff has by three witnesses at least proved the due execution of the instalment-bond and the signatures on it of Defendants. The *Mookter* who got the deed registered has distinctly testified that the Defendants

themselves told him to get it registered, and there is proof that he was in their employ as a *Mookter*. On the deed are indorsed three separate payments ; one by an uncle of Defendants, who was summoned by Plaintiff, but would not appear, and the other two payments by principal servants of the Defendants. As corroborative evidence, the seven or eight bonds on which the money was borrowed have been filed, bearing the signature of the Executor, and documents from the Collectorate, which are not and cannot be impugned, showing that the money borrowed was expended in paying up revenue due on Defendants' estates. It is true that the subscribing witnesses to the instalment-deed are not of high respectability in point of station, but their testimony has been verified by persons of higher position, who were present at the execution of the deed. On the other hand, the signatures on the deed of each of the three Defendants have not been challenged, nor the signature of the Executor on the bonds. The *Mookter* who got the deed registered, and the subscribing witnesses to it, have several of them been proved to be in the Defendants' employ, and to reside on their estate, though declared by the Defendants to be utter strangers. The Plaintiff has denied that there were any accounts to be produced, except the banking-books, which they have produced, and which have not been impugned, and Defendants have not filed any accounts of the Executor to gainsay what appears in those books and is substantiated by the Collectorate documents. The Defendants' uncle, summoned by the Plaintiff to testify to one of the indorsements, would not appear, and the Defendants would not summon their two servants to testify against the other two indorsements.

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Here was an admirable opportunity, not accepted, for falsifying the deed. The payments indorsed seem to have been made in the lifetime of the Executor ; and had the deed been forged, the names of three persons so much in the interest of the Defendants would not have appeared as the payers, nor would the names of the subscribing witnesses have been all, save one, written by one person, and the writer of the deed a servant of the Defendants. The instalment-deed was written while the dispute about the farm was pending in the Magistrate's Court, and the registry made after the *Razeenamah*, or deed of relinquishment, was filed by the farmer. So far, therefore, as that affair is connected with the execution of the deed, if the farmer were a servant of Plaintiff, probability in favour of the deed is more apparent than improbability, the registry being kept back till the *Razeenamah* was filed. Lastly, nothing to impugn the integrity of the Executor, or of the Plaintiff, on the fairness of their dealings with each other, has been adduced. I think, therefore, sufficient proof has been produced to establish the due execution and registry of the instalment-bond, and nothing of weight to throw doubt on that proof. On being asked by me in Court how the bonds of the Executor remained with the Plaintiff after execution of the instalment-deed, it was answered, that money-lenders in such cases retained the bonds as collateral proof, and, in lieu of giving them up, inserted their dates in the instalment-deed. I would uphold the decision of the Lower Court, and dismiss the appeal."

The present appeal was from the decree of the majority of the *Sudder* Court.

As the Respondents did not appear, the appeal was heard *ex-parte*.

Mr. *R. Palmer*, Q.C., and Mr. *Leith* for the Appellant.

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There was sufficient evidence of the loans, which formed the consideration of the *Kistbundy*, having been contracted by the Executor and trustee under the Will, and that those loans were applied for the benefit of the *Zemindary*, therefore, the Respondents were liable to the Appellant as the lender, under the express terms of the Will of their father, and bound to pay the same on their coming of age, as the payment of the loans by the Will created a charge upon the estate, *Hunoomanpersaud Panday v. Mussamat Babooee Munraj Koonweree* (a). As to the *Kistbundy*, that instrument was also proved; indeed, the *Mookternamah* for the registration fully recites that document, and the fact of its execution by the Respondents. The charge in the pleadings of the Respondents of fraud and collusion between the Executor and the Appellant was unfounded and not established; but such a charge could not avail the Respondents as a defence in the present suit, which is solely confined to the validity of the *Kistbundy*.

At the conclusion of the argument, their Lordships intimated their opinion that as at present advised they thought the decree appealed from could not be sustained.

The appeal stood over for consideration.

Judgment was now delivered by

The Right Hon. Lord KINGSDOWN:—

We have looked carefully through the papers in this case, and remain of the opinion, which we inti-

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(a) 6 Moore's Ind. App. Cases, 393.

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mated at the hearing, that the decree cannot be supported. Considering the large amount of the sum at stake, and the position in life of the Respondents, it is difficult to account for their omitting to appear at our Bar to maintain the decree which they have obtained. But as far as we can discover, the proceedings of the Appellant have been regular, and she is entitled therefore, to call upon us to dispose of the appeal *ex-parte*.

The Appellant carries on business as a Banker ; in that character she alleges that she made very large payments for the Respondents, during the time that they, or some of them, were minors, in respect of *jumma* or revenue due to the Government from a *Zemindary* belonging to them. These advances are alleged to have been made at the instance of a person who was the guardian of the infants, and Executor and trustee under the Will of their father. For these sums the Respondents on taking possession of their *Zemindary* had given a *Kistbundy*, or engagement, to pay the amount by instalments, and for one of the instalments so secured the action in this case was brought.

There appears to be great reason to suspect fraud on the part of the guardian, and some reason to believe that the agents of the Appellant were privy to it. There can be little doubt that the lease of the Respondents' *Zemindary*, which was made by the guardian to a servant of the Appellant, and which was disputed by the Respondents and surrendered by the lessee, was really made to the servant as the nominee and for the benefit of the Appellant. It is very possible that if the Respondents had instituted a suit to take the accounts of this guardian, and,

charging collusion between him and the Appellant, had investigated the transactions which had taken place, it might have appeared that there was no such sum as was claimed by the Appellant justly due to her.

The Judges of the *Sudder* Court, who have pronounced a decree in favour of the Respondents, seem to have been influenced by reasons of this nature, and to have rested their judgment on the ground, that no adjustment of accounts had taken place to ascertain the balance really due to the Appellant before the *Kistbundy* was granted.

But we think that this objection, under the circumstances, cannot be allowed to prevail ; for the question, whether it would be fit to insist on this adjustment was distinctly brought under the notice of the Respondents before the *Kistbundy* was executed, and decided by them in the negative. It is proved by *Hurro Gobind Sen* that when a claim was made upon the Respondents in respect of the Bonds given by the Executor and guardian, they were desirous of avoiding the payment, and consulted him as to the mode of doing so ; that they were advised by him that they could only do so by instituting a suit to which the Executor must be a party, and in which a settlement of his accounts would be required. Now, the Executor was their spiritual guide, and had been the spiritual guide of their father, and it was not considered proper to institute a suit against him. Under these circumstances it was thought better to come to terms with the Appellant, to obtain time for payment of the debt by instalments. The *Kistbundy* was accordingly executed, and the witness says that he considered the arrangement beneficial to the Respondents.

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There seems no reason whatever to doubt this statement. *Hurro Gobind Sen*, who makes it, was in the employment of the Respondents, was connected with them by marriage, and was referred to in their answer as one of their agents who ought to have been employed in any business of this description.

It appears impossible to permit the Respondents, after the death of the guardian, now to dispute their liability for payment of the debt which they had thus deliberately undertaken to pay.

The *Kistbundy* itself and its registration appear to be regularly proved, payments have been made of some of the instalments, and such payments are indorsed upon the instrument. The account books of the Appellant were produced at the hearing, and the fact of the payments made by her as the consideration for the bonds given by the Executor seems to have been thereby established.

Whatever suspicion may attach to the dealings between the Appellant and the Executor it cannot affect the decision of the present suit. We think that the decree of the *Zillah* Court must be restored, and the decree of the *Sudder* Court reversed, and that the Appellant must have the costs of the proceedings in the *Sudder* Court, but we are not inclined to give any costs of this appeal.

We will make a report to Her Majesty in conformity with the opinion which we have expressed.

MUSSUMAT KRIPOMOYE DEBIA - - - Appellant,
 AND
 GERISCHUNDER LAHORE, and others - - Respondents.*

*On appeal from the Sudder Dewanny Adawlut at
 Calcutta.*

Revenue sale—Setting aside—Grounds for—Benami—Evidence—Burden of proof.

Suit to set aside a sale of *Putnee Talooks*, for arrears of rent, on the ground of an irregularity in the proclamation of sale, as the lease was alleged to be held by the lessee in *Benam*, and that the proper party's name did not appear, dismissed, the *Ikrarnamah* creating the alleged trust being declared a forgery.

THE Appellant in this suit sought to recover possession of the *Putnee Talooks*, *Dehee Chateaugour* and *Luckeebatta*, situate in the *Zillah, Rajshahye*, of which *Rajah Kisha Chunder Bahadoor* was *Zemindar*, with *wasilat*, or mesne profits. In order to obtain such possession the Appellant sought by the suit to set aside, on the ground of irregularity, a sale by the lessor, made in the year 1836, under *Ben. Reg. VIII. of 1819*, for arrears of rent.

2nd July,
 1861.

The facts of the case and the evidence sufficiently appear from their Lordships' judgment.

The appeal was argued by

Mr. *R. Palmer*, Q. C., and Mr. *Leith* for the Appellant ; and

Mr. *Forsyth*, Q. C., and Mr. *W. Field* for the Respondents.

* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Master of the Rolls (the Right Hon. Sir John Romilly), and the Right Hon. Sir Edward Ryan.

Assessor,—The Right Hon. Sir Lawrence Peel.

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As to the lease being a *Benamee* transaction, and the effect of such a trust by the Hindoo law, the case of *Goopeekrist Gosain v. Gungapersaud Gosain* (a) was referred to.

Their Lordships' judgment was reserved, and now delivered by

2nd August,
 1861.

The Right Hon. Sir John ROMILLY:—

The question in this appeal is, whether the purchase of a *Putnee Talook* made by *Juggurnath Roy*, on the 6th of *September*, 1835, was a *Benamee* transaction—that is, whether it was bought with the money of and in trust for *Hurro Kanth Roy*, who is now deceased, but whose widow is the Appellant. Substantially, the question depends upon, whether an *Ikrar Puttro*, or declaration of trust, purporting to bear date the 29th *Kartick*, in the year 1242, which corresponds to the 14th of *November*, 1835, and which also purports to have been executed by *Juggurnath Roy*, is a real or a supposititious document.

We entertain no doubt, if on the evidence it should appear that no reliance is to be placed on this document, that there is no other evidence before us sufficient to establish that the transaction in question was a *Benamee* transaction.

In consequence of the non-payment of the rent, the amount of which was disputed, the *Putnee Talook* was, after various proceedings to which it is unnecessary to advert, sold by the revenue authorities, on the 21st of *May*, 1836, by public auction, to *Kalee Kanth Lahoree*, who was the highest bidder; who has since died, but whose heir is the first Respondent on the record.

(a) 6 Moore's Ind. App. Cases, 53.

The suit to recover the *Putnee Talook* was first instituted by *Hurro Kanth Roy*, on the 1st of *March*, 1845 ; that suit failed in *April*, 1850, by reason of mis-dating the *Ikrar* in the plaint, which error the Court refused to allow to be corrected.

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On the 18th of *July*, 1850, the Appellant filed her plaint in this suit.

On the 26th of *December*, 1854, the Principal *Sudder Ameen* dismissed the Appellant's suit with costs.

This decision was appealed from to the Court of *Sudder Dewanny Adawlut* at *Calcutta*, and on the 28th of *December*, 1857, the decree of the Court below was affirmed with costs, which is the decree appealed from to us.

The original *Kubalah* granting the *Putnee Talook* was made on the 22nd of *Bhedoon*, 1242, which corresponds to the 6th of *September*, 1835 ; it was attested by fourteen witnesses, and at the same time a *Kuboolaut*, or counterpart, was executed by *Juggurnath Roy*, containing the usual condition that, if the rents were not paid, the *Zemindar* should be at liberty to sell the *Talook*, under the provisions of Regulation VIII. of 1819. This counterpart was executed by nine witnesses, of whom the first and last were also attesting witnesses to the *Kubalah*, but the remaining seven witnesses were distinct and different persons.

That the same witnesses, fourteen in number, who attested the *Kubalah* should be obtained to attest the *Ikrar*, two months later, is a circumstance which, in our mind, gives rise to very grave suspicions. No valid reason is given for this peculiarity ; the collection of exactly the same fourteen persons who had attested an instrument two months before, for the

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purpose of attesting another instrument, must have occasioned both difficulty and delay, and it is not pretended that the circumstance of the witnesses who attested both instruments being the same could confer additional validity on the *Ikrar*. So little did this seem to be a matter of importance to the parties engaged in the transaction on the 6th of *September*, 1835, that of the two instruments then simultaneously executed, only two witnesses attested both. The suspicion created by this circumstance is augmented by the consideration that in the original plaint, which was filed on the 1st of *March*, 1845, the *Ikrar* is alleged to bear the same date as that of the *Kubalah*. If, in truth, the *Ikrar* had been executed at the same time with the *Kubalah*, it might well be that the same witnesses who attested the lease would also attest the declaration of trust; and, indeed, such a supposition would be natural and probable. Upon the assumption that the original Plaintiff had intended to set up a fictitious *Ikrar*, with the view of establishing the transaction to be one of a *Benamée* character, it would be natural to set up an *Ikrar* of even date with the original *Kubalah*, in which case it would be naturally attested by the same witnesses, and accordingly such was the Plaintiff's allegation contained in the original plaint; and we cannot but consider it a matter also open to suspicion that, in so important a matter as the statement in the plaint of the *Ikrar*, on which the whole of the Plaintiff's case depended, an erroneous date should have been assigned to that instrument. It is to be observed, also, that the *Ikrar* itself, on the face of it, seems to have been framed as if it had been intended to be contemporaneous with the *Kubalah*, for it speaks of the delivering up of the *Umulnamah*, or letter of

authority, of to-day—that is, of the day of the date of the *Ikrar* ; but the only *Umulnamah* of the existence of which any evidence is given is the *Umulnamah* of the date of the original *Kubalah*.

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On the assumption that it was intended to set up a fictitious deed, various circumstances might, after the institution of the original suit, render it impossible to act on that intention, and to establish by proof an *Ikrar* of even date with the original *Kubalah*.

The following are instances:—The witnesses speak of *Hurro Kanth Roy* as having been present at the time when the *Ikrar* was executed, and even of the conversation which passed between him and *Juggurnath Roy* on that occasion. *Hurro Kanth Roy* was, at the date of the execution of the *Kubalah*, distant four or five days' journey off, at *Calcutta*. This fact might possibly have been established by evidence brought on the part of the Defendants. There were present, at the time when the *Kubalah* was executed, in *September*, 1835, the witnesses to the *Kuboolcut*, and these witnesses, or some of them, might have been called, and not only disproved the presence of *Hurro Kanth Roy*, but might also have disproved the execution of any *Ikrar* at all at that time, and might have given evidence which would have been irreconcilable with the evidence on the part of the Plaintiff.

Assuming, therefore, that a fictitious deed was intended to be set up, this circumstance might explain how it was originally intended to set up an *Ikrar* of even date with the original *Kubalah*, and how that intention was afterwards abandoned as far as regarded the date of the instrument.

Another circumstance which creates grave suspicion

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in our minds is the age of *Hurro Kanth Roy* at the time of the transaction. This we consider to be proved by the deposition of *Hurro Kanth Roy* himself, made in a distinct matter on the 12th of *May*, 1843. By this deposition it appears that he was then at the Government School at *Rampoor*, and that he stated his age to be at that time seventeen or eighteen. This was eight years and nine months after the date of the *Ikrar*. This would reduce his age at the time of the transaction to nine or ten years old. The explanation attempted to be given, that he understated his age for the purpose of entering the school, by the regulations of which no pupil could be admitted who had passed a given age—even if admitted, could only extend to a year or two; but no latitude which could be given to this suggestion would induce us to believe that a man of twenty-six or twenty-seven could pass off for a youth of seventeen or eighteen; but we have no reason to doubt the accuracy of the statement of his age contained in the deposition which was made by himself in a matter in which his age was not a matter of importance, and by which it appears that he was then under the master of the school, and in which he speaks of the other lads of the school.

We are, therefore, of opinion that, on the evidence before us, the age of *Hurro Kanth Roy* in *November*, 1835, must be considered as not exceeding ten or eleven years. In what way a boy of ten or eleven years of age could be possessed of money sufficient for the purchase of the *Putnee Talook*, the evidence fails to explain.

But this is not the only difficulty presented in the way of the Appellant by the youth of her husband

at the time of this transaction. The evidence given by the witnesses of the conduct of *Hurro Kanth Roy* on this occasion is irreconcilable with the supposition that he was not more than eleven years old, even allowing much to the precocity ascribed to Indian youths.

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Ram Nedhee Deb says that this boy of ten or eleven years old gave directions for obtaining some of the *Rajah's Mehal*, if any were to be let out in *Putnee*. The witnesses all speak of his understanding the transaction, and taking a part in it.

Gooro Dyal Roy says that *Hurro Kanth Roy* sent the money for the *Kubalah*, Rs. 4700 in specie, from *Calcutta*, by him and three other persons, accompanied by five or six others, by a boat; a very improbable mode of transmitting money in a country where Government notes were in circulation.

Kalee Pershad Dass says that *Juggurnath Roy* and *Hurro Kanth Roy* corresponded on this subject, and that *Hurro Kanth Roy* wrote letters to *Juggurnath Roy* on the subject; and they all state that he went from *Calcutta* to *Sydabad*, for the purpose of completing the transaction.

A careful examination of the witnesses also discloses various inconsistencies in their testimony. Two of them, namely, *Haroo Dass* and *Gour Mohun Dass*, in their depositions made in the first suit, speak of the *Ikrar* as originating from *Juggurnath Roy*; but the two witnesses examined in the suit, *Ram Nedhee Deb* and *Sheetal Ram Raha*, say that the *Ikrar* was made at the instance of *Hurro Kanth Roy*.

This latter observation would not have much weight were it standing alone, but combined as it is with the other circumstances enumerated above, it adds to the

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suspicion necessarily created by the other facts in the case. It is not to be overlooked, also, that the *Ikrar* was not registered; to this omission, however, little weight would have to be attached, if the whole of the rest of the case were free from suspicion, by reason of the desire to keep the matter secret, which, on the assumption that it was a *Benamee* transaction, and intended to be concealed from *Rajah Gobin Chunder*, was intelligible enough.

The circumstances above enumerated, if they stood alone, would bring our minds to the conviction that no reliance could be placed on this *Ikrar* in a Court of Justice as an authentic document.

But there is some evidence, on the other hand, in favour of the transaction having been originally a *Benamee* transaction. The strongest portion of this is to be found in a letter which, singularly enough, has been produced on behalf of the Defendant, *Kalekanth Lahoree*; it is, therefore, free from all suspicion when used on behalf of the Plaintiff: this is a letter written in *October*, 1835, between the date of the *Kubalah* and the *Ikrar*, addressed to *Juggurnath Roy*, apparently by the *Maharanee Kishenmonee Takooranee*, who was the aunt of *Hurro Kanth Roy*. It seems to have been written in answer to a letter from *Juggurnath Roy*, requesting from her directions respecting this *Putnee*; and in it she directs that a *Mookternamah* should be made out in the name of *Nub Kanth Roy*, and coupled with that of *Oomapersaud Lahore*, to whom the documents relating to the *Putnee* and the *Kubalah* were to be forwarded. This direction, to some extent, at least, seems to have been acted upon by *Juggurnath Roy*, and it is certainly very difficult to reconcile the writing by *Juggurnath Roy* of the

letter to which this was an answer, with the supposition that he was the beneficial owner and purchaser of the *Putnee Talook*. This observation, however, although in favour of holding that the transaction was originally one of a *Benamee* character, does not establish the case of *Hurro Kanth Roy*, or make out any title in him to the *Putnee Talook*. It may be that the *Maharanee* was the purchaser of the *Putnee Talook*, but that is not the case of the Plaintiff, or what we have to consider in this appeal. This document has however, although indirectly, a bearing on the part of this case, which is that which is indeed the principal foundation of the Plaintiff's case, namely, the presence of all the deeds and papers relating to this *Putnee Talook*, and the *Wasilat* papers during the time which elapsed after the *Kubalah*, and before the sale in *May*, 1836, which are all now in the hands of the Plaintiff. This letter of the *Maharanee* authorizes the delivery of all papers relating to the *Kubalah* to *Nub Kanth Roy*. *Hurro Kanth Roy* is stated in the judgment of the Court to have resided with *Nub Kanth Roy*, who predeceased him, and it is suggested that by this means the original documents may have come into the possession of *Hurro Kanth Roy*. Whether this be so or not, it will not, in our opinion, affect the ultimate decision of the case.

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The mode by which the Plaintiff alleges that she acquired possession of these documents is not established to our satisfaction, and this being so, we cannot allow the simple possession of them to outweigh the other circumstances of the case, which, in our opinion strongly preponderate in favour of the Respondent.

One circumstance, however, and that a very material one, remains to be noticed, and which makes

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strongly against the claim of the Appellant; and this circumstance is, that the sale having taken place in *May*, 1836, no suit is instituted until *March*, 1845, a period of nine years. This circumstance is the more noticeable because it appears that the *Rajah Gobind Chunder*, on whose account alone the matter is alleged to have been kept secret, had died in *November*, 1836, thereby releasing *Hurro Kanth Roy* from the fear of his making any claim to the *Putnee Talook*, the apprehension of which is alleged to have been the cause of the *Benamee*.

Another circumstance connected with this lapse of time is also most important, for the suit was not instituted until after the deaths of both *Juggurnath Roy* and of *Nub Kanth Roy* had taken place, and they were the persons who could have spoken positively to the truth of this case, and whose evidence was of the greatest value in the determination of it.

Taking all these matters into consideration, and also bearing in mind that this is an appeal from the unanimous decision of the Court below on a question of fact, in which they had the opportunity of seeing and testing the mode of giving evidence of such witnesses as appeared before them, we are of opinion, that the decision of the Court below ought to be affirmed; and their Lordships will humbly recommend Her Majesty to dismiss the appeal, with costs.

CHUNDERMONEE DEBIA CHOWDHOORAYN, - Appellant,

AND

MUNMOHEENEE DEBIA - - - - Respondent.*

*On appeal from the Sudder Dewanny Adawlut at Calcutta.**Practice—Privy Council—Appeal to—Finding of fact—Interference.*

It is the practice of the Judicial Committee, in a case of disputed fact when the Courts in India appear to have diligently investigated the evidence, and no palpable mistake is apparent in the appreciation by the Court below of such evidence, to affirm the decree appealed from with costs.

An adoption said to have been made by a Hindoo widow in compliance with a power given her by an *Unoomuttce Puttro*, alleged to have been executed by her deceased husband, which adoption did not take place until seventeen years after his death, decreed by the Courts in India as unfounded in fact and the deed a forgery. Such finding sustained on appeal by the Privy Council.

THIS suit was brought by the Appellant on behalf of *Sookda Gobind Chowdhoree*, a minor, as the adopted son of *Doorga Gobind Chowdhoree*, deceased, claiming by his adopted mother and guardian. The principal objects of the suit were, first, to establish the minor's rights, as such adopted son, to the estate of his adoptive father; secondly, to set aside and cancel a clause in a *Solehnamah* (deed of compromise), alleged by the Appellant to have been fraudulently introduced by *Burda Gobind Chowdhoree*, the late husband of the Respondent, in which deed the Appellant admitted, that no permission or authority had been given her to adopt a son to her husband, and that, therefore, upon her death, the estate of her late husband devolved upon *Burda Gobind Chow-*

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* Present: Members of the Judicial Committee,—The Right Hon. Lord Kingsdown, the Lord Chief Baron (The Right Hon. Sir Frederick Pollock), and the Right Hon. Sir Edward Ryan.

Assessor,—The Right Hon. Sir Lawrence Peel.

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dhoree, his uterine brother ; and, thirdly, to set aside, as fraudulent and void, two other Bengalee instruments, called respectively a *Hibbanamah* (deed of gift) and an *Ikrarnamah* (deed of agreement), purporting respectively to bear the seal of the Appellant, made in favour of *Burda Gobind Chowdhoree* by the Appellant ; on the ground, that the same were prepared, and the seal of the Appellant surreptitiously and fraudulently impressed by *Burda Gobind Chowdhoree* himself.

The facts of the case were these:—

The Appellant was the widow of *Doorga Gobind Chowdhoree*. *Doorga Gobind Chowdhoree* had two brothers: the elder, *Goroo Gobind Chowdhoree*, a half brother, and the younger, *Burda Gobind Chowdhoree*, whose widow, *Munmohenee*, was the Respondent. The three brothers lived as a joint undivided family, and held possession jointly of their ancestral and acquired property. *Doorga* died in 1830. After his death litigation arose in the family, and the property was, by a compromise, (the terms of which were embodied in a *Solehnamah*, dated the 19th of *January*, 1838,) divided in the proportion of half to the eldest brother, *Gooroo*, and half to the younger brother, *Burda* ; and the Appellant, *Chundermonee*, who was by the death of her minor son entitled, as his heiress and representative in estate, to the share which had belonged to her husband. *Gooroo* gave up so much of the property in his possession as made up the share of *Burda* and *Chundermonee* to half ; and *Burda* gave up, on the part of *Chundermonee* and himself, so much of the property in his own possession as made up the share of *Gooroo* to half. This deed in form addressed to *Gooroo* by *Burda* and *Chundermonee*, contained

the following clause:—"Further, I, *Chundermonee Dibbea*, have no male or female issue, nor have I any permission to adopt a son. After my death, my share will revert to *Burda Gobind Chowdhooree* and his heirs, and your heirs have no concern in the matter. At no period will yourself or your heirs put forward any claims to the above share ; such claims, if ever made, will be inadmissible."

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Not long after the compromise, *Chundermonee*, in consideration of *Burda* having given up his own rights, and of his being entitled to the property in reversion, executed a *Hibbanamah*, or deed of gift, dated 1st *Bhadoon*, 1246 (*August*, 1840), by which she gave him certain estates. This gift was qualified by a later deed, called an *Ikrarnamah*, dated 19th *Thalgoon*, 1246 (*March*, 1841), by which, after stating that the rents arising from the estates which she had not given him were insufficient for her expenditure, she gave him power to manage her remaining estates, but directed that the profits of all the property comprised in both deeds should be applied for her own purposes. In both the last-mentioned instruments, the statement that *Chundermonee* had no authority to adopt, and consequently that the property would devolve upon *Burda* after her death, were repeated.

In 1849, the Appellant filed a plaint in the Civil Court of *Zillah Rajshahye* against the Respondent, *Munmohenee Debia*, the widow of *Burda* ; and *Bejoy Gobind*, the eldest son of *Gooroo* ; *Sheebsoondree*, the mother of *Gobind* ; and one of the widows of *Gooroo* ; and *Hursondree*, another of the widows of *Gooroo*.

In this plaint the Appellant sought to set aside the above particular portion of the *Solehnamah*, made between her and *Burda Gobind Chowdhooree* on the one

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hand, and *Gooroo* on the other hand, on a settlement of some family disputes and litigation in that year, and about ten years after the death of her husband. The particular passage in this deed which the Appellant objected to, was the one which alleged that she had not any permission from her husband to adopt a son. The substance of the plaint was, that the Appellant had had one son by her husband *Doorga*, named *Sarodha Gobind Chowdhooree*, who had survived her husband, and had died before reaching his majority, in 1835; that that son being in bad health and misfortunes having been predicted to him by his horoscope, her husband had before his death given to her, in *May*, 1830, a deed of permission to adopt three sons consecutively in case of *Sarodha's* death; that after her husband and son's death she had lived jointly in mess with *Burda*, and, from the time of his coming of age, had entrusted him with the entire management of her affairs, and had placed her seal in his possession; that litigation having arisen between *Gooroo* on the one hand, and herself and *Burda* on the other, with reference to an ancestral *Zemindary* called *Sonabajoo*, this litigation had been compromised in the year 1838, by the deed of compromise, which deed had, as she alleged, been fraudulently filed in Court by *Burda* without her consent; that after *Burda's* death, in 1844, his widow (the Respondent), *Munmohenee*, had forwarded to her (the Plaintiff) her seal, which had been left by her for a long time in the custody of *Burda*; that in *August*, 1845, she had proceeded to adopt a son (*Sookda Gobind Chowdhooree*) under the alleged deed of permission given by her husband, and that she had then discovered that *Burda* had unnecessarily and fraudulently caused to be inserted in the *Solehnamah*

a statement that she had no permission from her husband to adopt, and that after her death her share would revert to *Burda* and his heirs ; that afterwards *Burda* had caused to be prepared a *Hibbanamah* and an *Ikrarnamah* relating to the same property as the *Solehnamah* without her knowledge, and she prayed that the rights of her adopted son might be established, by annulling the particular statement in the *Solehnamah* which she objected to, and by cancelling the deeds of *Hibbanamah* and *Ikrarnamah*.

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The Respondent, *Munmohenee*, by her answer, denied the allegation of the Plaintiff that, on the death of her husband, she had entrusted *Burda* with the management of her affairs ; and alleged that it was untrue and incredible that the *Solehnamah* complained of should have been filed by *Burda* without the knowledge of the Plaintiff, since she had been fully informed of the nature of the compromise with *Gooroo*, in which the *Solehnamah* had been drawn up, the drafts of the deeds having been sent to her at *Tantee Bund* for her information, and the deeds themselves having been filed in the Court of Mr. *Barlow*, the then Judge of the *Zillah* Court, after distinct inquiry as to her consent to their contents ; and the answer further alleged that the Judge had taken the precaution of sending back to the Plaintiff the *Solehnamah*, for the purpose of enabling her to affix her seal to it, and had caused it to be filed in Court, after taking the depositions of several respectable witnesses to the Plaintiff's execution, and making on the deed itself a memorandum on this point. It also alleged, that the Judge had ultimately decided the suit in which the *Solehnamah* was filed under its

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provisions. The answer then averred, that it was necessary and material to mention in the *Solehnamah* that the Plaintiff had no permission to adopt, since the compromise had been made on the footing of *Burda* having a reversionary right to the property of the Plaintiff's deceased husband, and that *Burda* had, upon this understanding, given up his own property referred to in the compromise, in order to obtain for himself and *Chundermonee* certain other property which had been subsequently, and was then still enjoyed by the Plaintiff, and others, under the terms of the compromise ; it also averred that, by numerous earlier petitions and proceedings in the Courts, the Plaintiff had herself disproved the allegations made in her plaint as to *Burda* having had possession of her seal, and had distinctly admitted her execution of the *Ikrarnamah* complained of. The answer also denied that *Sarodha* had been sickly before the death of his father *Doorga*, or that *Doorga* had given to the Plaintiff any permission to adopt ; and it pointed out that it was very improbable that he should have done so, since he was, at the time when he was alleged to have made this deed, a young man, having one son, with the probability of having others, and that he had lived six months after the date of the supposed deed ; and although he was the owner of considerable property, he had not, in that interval, caused the deed to be registered ; nor had the Plaintiff, after her husband's death, in any way alluded to the deed in the declarations made by her before the public authorities, and in the petitions she had filed, after *Sarodha's* death, in which she had represented herself as the heir of *Sarodha*. The answer further

alleged, that it was very improbable that the Plaintiff would, if she had really obtained from her husband a right to adopt, have entrusted *Burda* with the management of the estate, since he was a co-sharer in the property with her, having on her death a heritable right to her husband's estate ; and it stated that, in fact, *Burda* had not been so entrusted, but that the Plaintiff had herself managed her estate for seven years, between the death of her husband and son, and the majority of *Burda*, during the whole of which period she had never mentioned to any of the authorities that she was in possession of a deed of permission to adopt. The answer then pointed out that nearly twelve years had elapsed between the death of *Sarodha* and the exercise by the Plaintiff of the alleged right of adoption ; and that about seventeen years had elapsed from the date of the alleged deed of adoption, before the Plaintiff had brought it forward.

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The Defendant, *Bejoy Gobind Chowdhooree*, by his answer, alleged that the Plaintiff had had full knowledge of the contents of the deed, a portion of which she was seeking to set aside, and that all the terms embodied in it had been inserted therein with her full consent ; that not only had the signature and assent of the Plaintiff been distinctly proved under the precautions taken by Mr. *Barlow* for that purpose, but that she had, in *January*, 1838, sealed a *Mookternamah* properly attested, in order to give effect to the compromise ; that although the *Solehnamah* had been so long filed in Court, and the Plaintiff had, after her husband's death, managed her own property and instituted various suits, she had not for a very long

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period raised any objection to the *Solehnamah*; and had indeed, within two and a half years of the commencement of the suit, taken a copy of the *Solehnamah* and inspected it, without making any objection to its purport. He also denied that the Plaintiff's husband had given her any authority to adopt, pointing out in detail the great improbability of her statement in that respect.

The Plaintiff's witnesses were called principally with the object of establishing the deed of permission to adopt set up by the Plaintiff, and to show that *Burda* had in his lifetime possession of the seal of the Plaintiff, and had affixed it to the *Solehnamah* without her consent or knowledge, and that the other documents relating to and consequent on the compromise had been drawn up and sealed by *Burda* without her consent. The statement of the witnesses called to prove the deed of permission to adopt, as to the time during which *Doorga* had been ill before his death, did not agree with the recital in the deed itself in this respect, and several of the witnesses who denied their attestations to the documents disputed by the Plaintiff, had, soon after the making of these documents, given opposite evidence before Mr. *Barlow*, the former Judge. The witnesses, on behalf of *Munmoheenee* and the other Defendants, substantially proved the allegations contained in the above-mentioned answers of the Defendants; the making of the compromise of *January*, 1838, and the Plaintiff's full knowledge of the terms of the *Solehnamah*; that the document was drawn up in the presence of numerous respectable witnesses, after a discussion as to the rights of the parties about to enter into the compro-

mise, and a distinct mention in the Plaintiff's presence of her being a widow without any son, and after that portion of the *Solehnamah* which referred to the fact, and to her having no authority to adopt, had been distinctly read out in her presence. They also proved the precaution taken by Mr. *Barlow*, in sending back the *Solehnamah* for the purpose of having the seal of *Chundermonee* affixed, and the subsequent affixing of the seal by *Chundermonee*. They also deposed to facts which established clearly that *Chundermonee* had had all along the possession of her seal, and had not intrusted it to *Burda*, and that the alleged adoption by *Chundermonee* had been illegal in substance, as she had paid money for the purchase of the child which she pretended to adopt. Owing to the death of the witnesses who had attested the fixing by *Chundermonee* of her seal to the *Solehnamah*, the Defendants were unable to call them before the Court, but it appeared by the earlier judicial proceedings, that four of these witnesses had, within a short time of the execution of this deed, appeared before the then Judge, Mr. *Barlow*, and deposed to its execution by *Chundermonee*. Evidence was also given showing that at the time when, as *Chundermonee* subsequently alleged, her seal had been left in the custody of *Burda*, she had herself stated the contrary in legal proceedings, and had affixed her seal to legal documents; that in other instances in the earlier litigation, *Chundermonee* had admitted the *Solehnamah*, and shown that she was well aware of its contents, and that she had dealt with the family property on the footing of the arrangement contained in the compromise, and had been a

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party to proceedings taken before the Courts to enforce the carrying out of it ; and that she had on many occasions described herself and sued as the heir of her deceased son, *Sarodha*, and had not mentioned the deed of permission to adopt, which she subsequently, and after the lapse of many years, had set up.

On the 26th of *July*, 1852, the Principal *Sudder Ameen* (*Abdool Alli*) gave judgment, dismissing the suit, with costs.

Chundermonee appealed from this judgment to the *Sudder Dewanny Court* at *Calcutta*.

On the 22nd *November*, 1852, the appeal came on for hearing before a full bench of the *Sudder Dewanny Court* (consisting of Sir *Robert Barlow*, Mr. *H. T. Raikes*, and Mr. *J. H. Patton*) ; when the Court, after referring to the evidence and issues, gave judgment in the following terms:—"There can be no doubt that the Plaintiff's object in bringing this suit has been to procure the recognition of her right to adopt a son, by putting to proof the validity of the *Unoomuttee Puttro*, and suing to get rid of certain admissions in existing documents which are opposed to the exercise of her alleged rights under the deed of adoption, on the averment that those admissions were introduced into the deeds in question with a fraudulent intent by her late husband's brother, without her knowledge or consent. The chief deed (to which it is only necessary to refer) is a *Solehnamah* filed in the suit before the Judge of *Rajshahye*, and, among other conditions relevant to the property then in litigation, it recites, that the ancestral property of Plaintiff's husband will be in-

herited after her death by her husband's brother, as she has received no power to adopt a son. This deed was filed in Court in the month of *January*, 1838, her husband having died in 1830, and the only son surviving him having died, before reaching his majority, in 1835. From the time of her husband's death till her assumption of the right to adopt in 1847, there is no proof whatever that she in any way intimated the possession of such a power, although there are admitted public acts on her part independent of the *Solehnamah* which might have naturally called forth some mention of her having been invested by her late husband with such a trust. Under these circumstances, it is impossible to withstand the strong and overpowering presumption against the Plaintiff arising from her own adverse admission in the *Solehnamah*, if it be established that that deed was filed in all its integrity with her knowledge and acquiescence. Of this we can entertain no doubt. The *Solehnamah* was filed in open Court with the greatest publicity by some of the parties themselves, and the agents of those not personally attending, on the 15th of the month of *January*, 1838, and on the deed itself is a memorandum written by the Judge of *Rajshahye* to the effect that as the deed exhibited no seal of the Plaintiff, *Chundermonee*, it should be forwarded to her residence on that day through parties named, that Plaintiff might affix her seal to the document in the presence of the parties so named by the Judge. There is another memorandum, written by the Judge on the 19th of the same month, certifying that his orders had been carried out, and that the parties indicated had authen-

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ticated the *Solehnamah* as the act of the Plaintiff, and to which she had affixed her seal in their presence. The decree of the Court then issued in the terms of the *Solehnamah*. Thus it is proved, and has now been admitted, that more than usual precaution was taken by the Judge of *Rajshahye* to ascertain and record that the Plaintiff herself duly certified by her own act her full acquiescence in the contents of the *Solehnamah*. She was a *Purdah* woman it is true, but parties apparently possessing her confidence, and in no other respect interested in the suit then pending, were specially deputed to witness her consent, and prevent the possibility of fraud being practised against her. It seems to us impossible, under these circumstances, to presume that she acted without a competent knowledge of the admissions contained in the deed, or at least to believe that she could have been long in ignorance of them when incorporated in the decision passed on that occasion. We coincide, therefore, in opinion with the lower Court, that the only reasonable conclusion is that she must have known the contents, and did of her own accord intimate thereby that she had received no power to adopt from her husband. Her assumption of that right now is under a deed which has never been certified by registration, or otherwise publicly recognised by her husband during his life, and is supported by no preponderating proof of its previous existence, cannot be recognized by the Court, and the claim of the Plaintiff, founded thereon, has, in our opinion, been most properly dismissed." And it was ordered, that the decision of the lower Court be confirmed, with costs, against the Appellant.

The present appeal was from this decree of affirmation. The case was argued by

The Solicitor-General (Sir *R. Palmer*) and Mr. *Leith* for the Appellant, and

Mr. *W. Macpherson* and Mr. *Maude* for the Respondent.

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The Right Hon. Lord KINGSDOWN:

The question in this case is a mere dispute as to facts; and, in a case of disputed facts, when they appear to have been proved and diligently investigated in the Courts below, and their Lordships can find no palpable mistake in the appreciation by the Court below of the evidence, they never advise Her Majesty to reverse a decree which is brought before them under such circumstances.

Now, this case appears to their Lordships to have been fully and fairly investigated.

The object of the suit was to establish an adoption, under a deed, dated the 19th of *May*, 1830, called an *Unoomuttee Puttro*, giving authority to adopt. The husband died within six months after that date, and the adoption which is now represented to have been made is not completed until *January*, 1847, seventeen years after the death of the husband.

Now, the only excuse for the delay is, that there was a son then in existence, and that so long as that son lived there was no necessity for the adoption of another son; but that son died in 1835, and from that year to 1847, there is not any proof whatever, or even an allegation, of any such power as is represented in this case having existed.

The first objection to this *Unoomuttee Puttro* is,

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that the instrument itself ought to have been, and in ordinary circumstances (considering the nature of the instrument, the importance to the family, and the amount of the property to which it relates) would have been registered, and would have been communicated to the different parties, the persons whose rights were likely to be affected by such an adoption. Nothing of the sort took place, although the party executing the instrument lived six months after the date of it.

It can hardly be pretended that, if no notice was given of this instrument until the year 1846, it would be possible to maintain such a deed; but it is said that in 1835, immediately after, or at least very soon after the death of the son, the deed was actually mentioned and set up by the present Appellant in a petition to the *Zillah* Court.

Now, upon referring to that petition their Lordships are satisfied, that the Court could come to no other conclusion than that which they arrived at. What is the proof? There is no proof whatever. A document is produced which purports to be a copy of an original existing on the file of the Court. The files of the Court contain no such original. It professes to have been compared by a person named *Mohamed Assim*, who swears that that which professes to be his original signature is a forgery. It also purports to have been written by one *Surroop Chunder Baugeheo*, who also states that he never heard of it.

It appears to their Lordships, therefore, that in the Court below, independent of the *Solehnamah*, which is conclusive, the evidence against the *Unoomuttee Puttro* is strongly preponderating of those witnesses

who swear to it. There are four witnesses produced, who, in terms, substantially and almost identically the same, state that the instrument was executed, and all fall into the same mistake as to the period at which the party executed it. On the other hand, the *Solehnamah*, which is a distinct recognition that there was no such instrument as this, appears to be free from all objection whatever.

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On the death of that son, the *Zemindary* was claimed by his uncle, the eldest brother of the father, and he instituted a suit against the younger brother and the Appellant, claiming the *Zemindary*. In that suit the parties came to a compromise, and executed a deed of *Solehnamah*, and it was essential to that compromise, as it seems to us, that the fact of there not being anybody in existence who could dispute the validity of that agreement should be stated. The deed accordingly, very naturally and very truly, states that the son who had been in existence was dead, and there could be no other son, because there was no power of adoption from the father.

Now, the deed not only has the seal of this lady attached to it, but is produced in Court. Sir *Robert Barlow*, the Judge before whom it is produced, seeing its importance, desired to have it fully ascertained, whether this deed was actually executed with the knowledge of this lady; he actually sends parties in whom confidence is placed, to have that verification of the instrument; they return an answer, that the deed was verified, and, she being a party to the suit, the *Vakeel* of the lady filed it in Court, and from that time to this it remains unimpeached.

Their Lordships are of opinion, that there was not the slightest pretence for this appeal, as the case had

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been very fully and ably investigated by the Courts below; both Courts agreeing in holding that the one instrument is valid, the other a forgery. In those judgments their Lordships concur, and they will, therefore, advise Her Majesty to dismiss the appeal, with costs.

MOHUN LALL SOOKUL and others - - Appellants,

AND

BEBEE DOSS and others - - - Respondents.*

On appeal from the Sudder Dewanny Adawlut at Calcutta.

Practice—Privy Council—Appeal—Valuation of property in dispute—Mode of—Principles—Evidence—Duty of Court.

The provisions of *Ben. Reg. X.* of 1829, imposing a stamp duty upon plaintiffs in respect of the value of the subject-matter sued for, should be strictly attended to by the Courts in India.

Upon evidence taken in India showing the value of the property in dispute, an Order in Council, which rescinded a previous Order allowing special leave to appeal, on the allegation of the suppression of material facts as to the value, discharged, and the appeal restored.

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 1861.

THE present application was to discharge an Order in Council, made upon a petition (a), which rescinded a previous Order in Council, granting special leave to appeal (b), on the ground, that there were omissions in the petition for leave to appeal of proceedings in the Court below, which would have shown the true value of the subject-matter in dispute, and for leave to restore the appeal.

(a) See *ante*, p. 193. (b) 7 Moore's Ind. App. Cases, 428.

* Present: Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. Lord Justice Turner.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

The present petition, after setting forth the facts reported on the previous petitions, stated, that the Court in India, having transmitted the depositions of witnesses examined by the Registrar of the *Sudder* Court, in compliance with the Order of the 22nd of *February*, 1860, which required evidence to be supplied by the Appellants, that the real or market value of the lands in dispute exceeded the sum of Rs. 10,000, had returned an answer that the value of the estate was not less than Rs. 950, which, calculated at twelve times the profits according to the mode of estimating the value in India, would exceed the prescribed sum of Rs. 10,000. The Petitioners also alleged that, there had been no intentional misrepresentation as to the value, or in keeping back the fact of the supplemental petition; and it was submitted, that the requirements of the Order of the 22nd *February*, 1860, were fully satisfied by the evidence establishing that the value of the estate was above Rs. 10,000, and the Petitioner prayed that, under the circumstances, the Order of the 26th of *June*, 1861, should be discharged, with costs.

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Mr. *Leith*, in support of the petition,

Contended, first, that there had been no fraud in respect to the amount of the stamp impressed on the plaint with respect to the value of the subject-matter in dispute; and that, if any error occurred, it arose from a misapprehension of the effect of *Ben. Reg. X.* of 1829; and, secondly, he submitted that the evidence taken before the Registrar of the *Sudder* Court established the fact, that the real, or market, value was above Rs. 10,000, which brought the case within the limit prescribed by the Order in Council of the 10th of *April*, 1838.

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Mr. *W. Field*, for the Respondents, opposed the application.

He insisted, in the first place, that as the plaint untruly stated the value of the property sued for, it was a fraud upon the revenue law of India, citing *Ben. Reg. X.* of 1829, and, therefore, that the Petitioners were not now entitled to any indulgence; and he further insisted, that if the Court entertained the application at all, it ought to be upon terms of allowing the Respondents to give evidence in India before the Registrar of the *Sudder* Court that the lands were not of the value stated.

The Right Hon. Lord Justice TURNER.

27th Nov.,
 1861.

In this case leave to appeal was granted by an Order of the 22nd of *February*, 1860, but it was provided by the Order that the leave to appeal should be null and of no effect, unless satisfactory evidence should be supplied by the Appellants to the Registrar of the *Sudder* Court, that the real or market value of the land in dispute exceeded the sum of Rs. 10,000. By an Order of the 26th of *June*, 1861, the Order of the 22nd of *February*, 1860, was discharged. The application now before us is to restore the appeal, and to discharge the Order of the 26th of *June*, 1861, with costs.

The petition on which the Order of the 22nd of *February*, 1860, was made, alleged that the real or market value of the land in dispute exceeded the sum of Rs. 10,000, the prescribed limit under which the *Sudder* Court has no power to grant leave to appeal; but that the amount laid in the plaint as the

value of the suit for the fiscal purposes being only Rs. 3,572 10a. 9p., three times the amount of the *Sudder jumma*, or rent, the Petitioners were prevented by the rules of practice of the *Sudder* Court from obtaining leave to appeal therein.

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The petition on which the Order of the 26th of *June*, 1861, was made, alleged that the Respondent, *Beebe Doss*, in her answer, insisted that the suit ought to have been valued according to Regulation X. of 1829, that is, at the real or market value of the land, and that the Appellants after this answer filed a supplemental plaint, stating that the suit had been by mistake valued at three times the *Sudder jumma*, and that it should have been valued at Rs. 4,300, the real or market value of the land, but that the stamp being sufficient to cover a claim of Rs. 5,000, no objection could exist on that head; and this petition further stated that the petition on which the Order of the 22nd of *February*, 1860, was made, had omitted to state the Respondent's answer, and the supplementary plaint, and it also stated, that the real or market value of the lands did not exceed the sum of Rs. 10,000.

In this state of circumstances, it was of course to discharge the Order of the 22nd of *February*, 1860, that Order having been obtained *ex parte*, and appearing to have been obtained upon an inaccurate statement of the facts, and the Order was discharged accordingly; but it being considered that there had been no intentional misrepresentation on the part of the Appellants, the Order of the 26th of *June*, 1861, by which it was discharged, was made without prejudice to any further application by the Appellants on notice to the Respondents.

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The case, therefore, now comes before us unprejudiced by what passed on the previous applications, and, it now appears, that the supplementary plaint did not allege the Rs. 4,300, to be the real or market value of the land, but stated it to be the auction price of the land, referring, of course, not to any then present auction, for there was none, but to some past auction at which the property had been bought, and meaning, no doubt, to refer to the auction mentioned in the plaint; and, it further appears, that the Appellants have laid before the Registrar of the *Sudder* Court satisfactory evidence that the real or market value of the land exceeds Rs. 10,000.

As the case now stands, therefore, there was no fraud practised upon this Court in obtaining the Order of the 22nd of *February*, 1860, and the condition on which that Order was granted has been fulfilled. There would seem, therefore, *prima facie*, to be no ground for now refusing to restore the appeal.

But it was said for the Respondents that the value of the land in dispute was untruly stated in the plaint, in fraud of the revenue laws of India, and that leave to appeal ought not, therefore, to be granted. Their Lordships are far from saying that, if they were satisfied that any such fraud was intended they would be disposed to grant the least indulgence to any party in any way participating in it, but in this case they are satisfied that, whatever misapprehension there may have been, there was no such fraud intended. It was a mistake on the part of the Court, no less than of the Appellants, to allow the cause to proceed upon such a representation of the value as was contained in the supplementary plaint, and their Lordships take this opportunity of suggesting that the terms of the

Regulation upon the subject of value should be carefully attended to. They think that, as this case now stands, the Order applied for cannot be refused upon the ground suggested.

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It was asked by the Respondents that they might be at liberty to go into evidence on the question of value, but their Lordships are not disposed to deviate in this respect from their original Order, which was carefully and designedly confined to evidence to be adduced by the Appellants, with a view to prevent the introduction, for the purpose of a merely fiscal Regulation, of a contested issue on the question of value, a result which, in their Lordships' judgment, ought in all cases, as far as justice will permit, to be avoided:

The petition before us asks that the Order of the 26th of *June*, 1861, may be discharged with costs, but their Lordships think that there should be no costs on either side.

The Order, therefore, which their Lordships will humbly recommend to Her Majesty to be made on this application, will be simply to discharge the Order of the 26th of *June*, 1861, and to restore the appeal.

OMANATH CHOWDRY and others - - - *Appellants,*

AND

SHEIKH NUJEEB CHOWDRY and others - *Respondents.**

On appeal from the Sudder Dewanny Adawlut at Calcutta.

Practice—Privy Council—Appeal—Cross appeal presented out of time—Entertainability—Conditions.

A cross appeal from a decree of the *Sudder Dewanny* Court in India, although not interposed within the proper time, admitted, upon conditions, (1), of the principal appeal being prosecuted ; and (2), that the principal and cross appeals be consolidated and heard on one printed case.*

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THIS was a petition by the Respondents for leave to prosecute a cross appeal from part of the decree of the *Sudder Dewanny* Court at *Calcutta*, dated the 31st of *December*, 1860, which affected their interests.

It appeared from the petition that *Omanath Chowdry* and the other Appellants being dissatisfied with the above decree, in due course appealed to the Queen in Council, and it was alleged that the effect of that decree was to deprive the Petitioners of a portion of the land sued for by them, which consisted of 2,339 *Beegahs*. That *Omanath Chowdry* and others, having by their petition appealed against the whole decree, the Petitioners, acting upon the practice of the Courts in India, regulated by the Act, No. XV. of 1853, thought

* Present: Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. Lord Justice Turner.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

that it would be open at the hearing of the appeal in England to offer objections to that portion which deprived the Petitioners of part of the land without incurring the expense of a cross appeal in respect thereof. That the Petitioners were afterwards advised that it was necessary to institute a cross appeal for that object, and that as the time for applying to the *Sudder Dewanny Adawlut* for leave to appeal had expired, under the circumstances, it was submitted, that a cross appeal ought to be allowed, and the Petitioners prayed for special leave to lodge a cross appeal, and that the same should be consolidated with the original, or principal appeal of *Omanath Chowdry* and others, and that the same should come on for hearing upon one printed case, provided that if such original or principal appeal should be dismissed for non-prosecution, then that the Petitioners should be at liberty to prosecute their cross appeal as a separate appeal.

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Mr. *Leith*, for the Petitioners, applied *ex parte* for leave to prosecute a cross appeal.

Their Lordships granted the application upon the terms embodied in the following Order in Council, made thereon:—"It is hereby ordered, that the Petitioners be, and the same are hereby allowed to enter and prosecute their cross appeal from so much of the decree of the *Sudder Dewanny Adawlut* at *Calcutta* of the 31st of *December*, 1860, as deprives the Petitioners of a portion of the 2,339 *Beeghas* of land sued for by their plaint, provided the principal appeal be prosecuted by the original Defendants to the suit, and in

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case the appeal and cross appeal are prosecuted, the same are to be consolidated and to be heard on one printed case on each side" (a).

(a) As to the necessity of a cross appeal, see *Nana Narain Rao v. Hurree Punt Bhao*, 6 Moore's Ind. App. Cases, 464; and *Myne Boyce v. Ootaram*, ante, p. 400.

THE COLLECTOR OF MASULIPATAM - - Appellant,

AND

CAVALY VENCATA NARRAINAPAH - - - Respondent.*

*On appeal from the Sudder Dewanny Adawlut
 at Madras.*

Hindu Law—Mitakshara—Inheritance—Property of Brahman dying without heirs—Right of Crown to take by escheat—Equities, if any.

The estate of a Hindoo of the Brahmin caste, dying without heirs, escheats to the Crown, as the Sovereign power in British India.

An estate taken by escheat is subject to the trusts and charges, if any, previously affecting the estate.

Exposition of the law of escheat laid down in the *Mitaschara*, ch. ii., sec. vii., art. 5, and the passages there cited, where it is said "Never shall a King take the wealth of a priest; for the text of *Menu* (ix. 189) forbids it. The property of a *Brahmana* shall never be taken by the King; this is fixed law." And also referring to *Narada*, where it is declared that "If there be no heir of a *Brahmana*'s wealth, on his demise, it must be given to a *Brahmana*, otherwise the King is tainted with sin." Held by the Judicial Committee, reversing the decision of the *Sudder Court at Madras*, that the title of the Crown by escheat to property of a Brahmin dying without heirs, subject to the duty, or trust impressed, prevailed against any claimant who could not show a paramount title.

Semble. There is no distinction in this respect between Sacerdotal Brahmins and the ordinary members of that caste.

15th 18th, &
 19th June,
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IN this case, the question raised was the right of the Government to seize as an escheat a *Zemindary*, in the Collectorate of *Masulipatam*, the property of a

* Present: Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

Hindoo of the Brahmin caste, who died without heirs, and without an adopted son.

The estate in question, called the *Zemindary* of *Vis-sunnappettah*, was held by a Hindoo of the Brahmin caste, named *Varegonda Ramanapah*, under a permanent *Cowl*, or grant, subject to the payment of the revenue to Government. On his decease in the year 1810, without issue, and without any adopted son, his widow, *Lutchmedavamah*, entered into possession, and continued so until her decease, which happened on the 1st of *September*, 1849.

It appeared that as early as the year 1795, the Respondent's family had been in the habit of advancing money to the owners of this estate, to enable them to pay the Government revenue, and other liabilities incurred on its account. The Respondent's father, *Cavalv Vencata Lutchmia*, continued to make advances to the widow *Lutchmedavamah* until the year 1838, when a balance of Rs. 48,614. 13a. 6p. was found to be due to *Cavalv Vencata Lutchmia* from her; and on the 20th of *April*, 1838, she executed a bond in his favour, by which she mortgaged to him the *Zemindary*, with the exception of two villages, as security for the payment of that sum, by instalments, and the permanent *Cowl* of the *Zemindary* was at the same time delivered up by her to *Cavalv Vencata Lutchmia*.

Default having been made in payment of the first instalment, *Cavalv Vencata Lutchmia* instituted a suit in the Provincial Court of *Masulipatam* against *Lutchmedavamah* to recover the amount of the Bond, which became due on the first default, by a sale of the mortgaged estate. That Court on the 10th of *March*, 1839, decreed that the amount

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due to *Cavalv Vencata Lutchmia*, with interest and costs, then amounting to Rs. 65,613. 2a. 4p., should be paid to him by the sale, in the first instance, of the property mortgaged by the Bond, and in the event of the proceeds of the sale not proving sufficient for the purpose, that the deficiency should be recovered from any other property belonging to the Defendant *Lutchmedavamah*.

Cavalv Vencata Lutchmia died shortly afterwards, leaving three sons, one of whom, the Respondent, on behalf of himself and his brothers, in the year 1840, presented a petition to the Provincial Court, praying for execution of the decree against *Lutchmedavamah*. On the 14th of *January*, 1841, the Provincial Court ordered that a precept be issued to the Assistant Judge at *Masulipatam*, directing him to enforce the decree by collecting the amount thereof from *Lutchmedavamah*, and from the mortgaged property, and to pay the same to the Respondent.

The Assistant Judge transmitted a precept, with a copy of the proceedings, to Mr. *P. Grant*, the then Collector of the District, upon which the Collector sent a letter to *Lutchmedavamah*, advising her to make arrangement with the judgment creditor for the satisfaction of his claim; and he added, that, if she did not enter into a compromise with the creditor, and report the arrangement to the Court within five days, she might be sure that the *Zemindary* would be attached, and the precept of the Court carried out.

In compliance with this requisition, *Lutchmedavamah* entered into a settlement with the Respondent, and on the 5th of *April*, 1841, following, executed a *Razeenamah*, which set forth that, the Collector had taken measures to effect a sale of

the property, and that she had, for the purpose of preventing such sale for the present, entered into a compromise with the Respondent, whereby she had undertaken to pay him Rs. 67,444. 12a. by eight annual instalments and that twelve of the fourteen villages of the *Zemindary*, and the hamlets attached thereto, and that the permanent *Cowl* granted by the Government to her late husband should remain under mortgage, according to the terms of the Bond sued on, till the principal and interest were discharged, the remaining two villages being reserved for her maintenance. This compromise was recorded, and the execution of the decree suspended. This arrangement was reported by *Lutchmedavamah* to the Collector on the 26th of April, 1846.

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In consequence of litigation between *Lutchmedavamah* and other parties respecting the *Zemindary*, the *Sudder* Court, on the 5th of December, 1841, suspended the execution of the compromise; but on the termination of those disputes, the Respondent again moved the *Sudder* Court to execute the decree of 1839, when that Court made the following order: "The delay to give effect to the *Razeenamah* in question particularized by the Petitioner (the Respondent), having in effect occurred, and he having thereby been subjected to loss of produce, from the estate transferable to him under the *Razeenamah* having been thus kept from him, the Court is of opinion, that it is just and equitable that Petitioner should be indemnified for the losses. The Court, therefore, direct the Civil Judge to adjust the Petitioner's claim, in regard to its amount, from the 15th November, 1841, on which date, according to the terms of the *Razeenamah*, the *Zemindary* should have been made over to the Peti-

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tioner, and to realize the same from the estate of *Lutchmedavamah* for the period terminating with her death, up to which the estate was in her hand, and for the remaining period from the party or parties who then held possession.”

Upon the death of *Lutchmedavamah*, in 1848, the *Zemindary* was attached by the Magistrate of *Masulipatam*; and possession taken by the Collector, under Act, No. XIX. of 1841. On the 16th of *July*, 1850, the Governor in Council of *Madras* declared the estate to have escheated to Government on failure of heirs, and directed the same to be assumed and incorporated with the *Circar* lands.

The Respondent presented two petitions to the Civil Judge of *Masulipatam*, praying to be put in possession of the *Zemindary*, in accordance with the stipulations of the *Razeenamah*. These petitions were rejected by an order of the Civil Judge, dated the 24th of *June*, 1853; but such order was reversed, on appeal, by the *Sudder Adawlut*, on the 13th of *February*, 1854, and that Court ordered the Civil Judge to execute the decree in suit of 1839, by making over the *Zemindary* to the holder of the decree, pursuant to the terms of the *Razeenamah*. An application was made on behalf of the Collector of *Masulipatam* to the *Sudder Adawlut*, for a review of the order of the 13th of *February*, 1854, on the ground that the *Zemindary* had escheated to Government on failure of heirs; but the Court declined to depart from such order, and confirmed the same on the 21st of *October*, 1854.

From these decisions there was no appeal, and the Respondent was put in possession of the *Zemindary*. Under these circumstances, the Appellant, as the

Collector of *Masulipatam*, on the 25th of *September*, 1855, instituted a suit against the Respondent to recover the *Zemindary*, alleging, amongst other things, that the title of Government to the estate was paramount to that of the Respondent, if, in fact, he had any valid title at all, and that *Lutchmedavamah* had no power or authority under the Hindoo law to alienate the estate, or any part thereof, in perpetuity, or to pledge the same, if at all, for any period beyond that of her own life, as against those entitled to the estate as next in succession to herself. That upon her death the estate passed by way of escheat to the Government, and vested therein, and that no act of *Lutchmedavamah*, could in any way defeat, postpone, or curtail the vested right of the Government, who upon her death became entitled by the Hindoo law to enter upon and enjoy the estate fully discharged from any incumbrances or liabilities created by her during her incumbency and possession thereof.

The Respondent by his answer denied that the title of Government to the *Zemindary* was paramount to that of the Respondent, which he insisted was absolute and established by law, and also denied that *Lutchmedavamah* was without power or authority under the Hindoo law, to alienate the *Zemindary*, or any part of it in perpetuity, or to pledge the same for any period beyond that of her own life, as against those entitled to the *Zemindary* as next in succession to herself; and the Respondent contended that, the *Zemindary* was an ancient *Zemindary* held under a permanent *Cowl*, guaranteed by a *Sunnud Istemrar Milkeut*, or deed of permanent property, with full power to dispose of or alienate

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it, and that no such *Zemindary* could escheat to Government after it had once been legally disposed of under a decree of a competent Court and the *Razee-namah*, and that such *Zemindary* could in no way be seized or attached by Government except for non-payment of the annual settlement, or *kist*, which had not happened in this case ; and the answer insisted, that *Lutchmedavamah* succeeded by the Hindoo law with full power of alienation, and that by that law a widow in possession as heir had full right to sell, mortgage, or alienate in perpetuity the property, or any portion of it, which she had inherited, for certain necessary purposes, such as the payment of debts contracted by herself or the former proprietors ; for lawful purposes, such as, in this case, the payment of Government *Peishcush*, or the discharge of liabilities, and also for her maintenance, binding the estate, and on such, as a matter of law, the Respondent craved the judgment of the Court ; and the answer further insisted, that on the death of *Lutchmedavamah* there was no part of the *Zemindary*, being her estate, remaining to lapse to Government, or to be claimed as an escheat, for that the whole of the estate had been already vested in the Respondent years before, by a decree of a competent Court, and by the *Razeenamah*, having the force of a decree ; that the delay in executing the decree and *Razeenamah*, which was not occasioned by the Respondent or his acts, could in no way alter his vested interest, or cut down his absolute right to possession and enjoyment of the lands and profits ; and that of all this the Government, through their agent, the Collector, were fully cognizant, having had due notice thereof before and at the time of the execution of the *Razeenamah*, and through

their agent, the Collector, having been consenting parties thereto ; and on those points, as matters of law, the Respondent craved the judgment of the Court.

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After the reply and rejoinder had been filed, the Court recorded the following points to be established by the Appellant and Respondent respectively:—The Appellant's points were ; first, to prove the title of Government to escheats, of the nature alluded to in the plaint. Second, that the widow, *Lutchmedavamah*, had no authority by Hindoo law to transfer her ancestral property to the Respondent ; and that she was only a life tenant, and had only a life interest in the same ; and third, that the property was seized by Government as an escheat, and to show authority for such act.

The Respondent's points were—first, to prove the present Respondent's title to the property. Second, that in the decree of 1839 he had authority under Hindoo law to alienate all property, personal and real, by demise or otherwise to any one. Third, that the Collector, or agent of the Government, was made acquainted with the stipulations of the *Razee-namah*, now disptued, and that he acceded to them. Fourth, that execution was never sued out for the decree of 1839, and what occurred officially thereupon. Fifth, that the property was not seized as an escheat, but *zufted* (sequestered), pending the decision of judicial authorities as to the respective rights thereto of different claimants. Sixth, that the property in question could, under no circumstances, escheat to Government ; and to show the order of succession to such property as laid down in Hindoo law.

Evidence was adduced on behalf of the Appellant

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and of the Respondent, to establish the facts above stated. It appeared from the Appellant's evidence that the Collector of *Masulipatam*, in the year 1830, had refused to register a transfer of the estate in question from the widow *Lutchmedavamah* to one of her relations, on the ground that it would prejudice the next heirs of her deceased husband.

At this stage of the proceedings, the Court of *Masulipatam*, at the instance of the Respondent, propounded the following questions to the Hindoo law officers of the *Sudder* Court:—"Whether a Hindoo widow (Brahmin) has authority to transfer by mortgage, or conditional bill of sale, all right and title to her real property (landed estate) on account of debts incurred by her for the payment of the Government *Peishcush*, her own personal expenses, as well as those of the establishment?—If such deed of transfer is valid and binding on her, her executors and assigns, having no direct heir at law?—Whether the estate of such party thus transferred during her lifetime can be escheated at her death, as *Bewariss*, or without heirs?"

To these questions the Pundits of the *Sudder* Court returned the following answers:—"The Hindoo law declares, that a widow inheriting the estate of her husband is bound to perform his exequial rights, maintain his relatives, and make daily religious gifts, in proportion to the extent of the estate. She cannot, likewise, fail in her punctuality of payment of the *Circar Peishcush*. These charges are so important, that the law holds the widow possessed of only real estate competent, when she has no other alternative, to alienate her right and title thereto by mortgage, or conditional bill of sale, in the

event of the estate not yielding, under any circumstances whatever, produce sufficient to meet the above charges, as well as her own personal expenses; and in the event of her having no cousins, or of her cousins having neglected to afford her the necessary pecuniary assistance. Under these circumstances, the Brahmin widow referred to in the question has, under the Hindoo law, authority to transfer by mortgage, or conditional sale, the real estate mentioned in the question, on account of the debt incurred, for the purposes therein stated. Such deed of transfer, emanating as it does from an authorized person, as stated above, is valid, and is, therefore, binding upon her and her relations. The only estate which would escheat to Government as *Bewariss*, or without heirs, is that of persons other than Brahmins, which might have been left undisposed of by the proprietors thereof; but the *Circar* cannot take as heirless property that which had been legally transferred by the proprietor thereof during his lifetime, and which has, in consequence, become the property of the transferee. In the present instance, therefore, the estate transferred, as stated above, cannot be escheated as *Bewariss*."

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The Civil Court of *Masulipatam*, on the 8th of *May*, 1857, pronounced its decree in the cause, by which it decided, that the object of the agreement of compromise was to make that permanent and absolute which the mortgage bond had made simply conditional or dependent on the amount that should be realized by the enforcement of the terms, namely, by the sale of the property alluded to; and although such deed might have been executed by the free will of the parties in question, the Civil Judge was of opinion,

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that such transfer, without good and sufficient cause shown, was illegal, and contrary to the provisions of Hindoo law. That from a full consideration of the whole of the circumstances of the case, the Court was of opinion, that the *Kararnamah*, or postponed petition alluded to, must be quashed, and that the provisions of the decree in the original suit of 1838, should be enforced in its integrity by the sale of the property therein alluded to, or so much thereof as might be sufficient to meet the balance of the award then made, and to no later period, the whole to be exposed at an upset price equal to that demand; and on failure to realize the sum decreed, the property itself should be made over to the Defendant. That, on the other hand, should the value of the property be more than sufficient to satisfy the award to the Defendant in the former decree, in consequence of there being no direct heirs to the deceased widow, *Lutchmedavamah*, the title of the Government to claim such property as an escheat was confirmed on payment of the lien thereon, namely, the balance due to the Defendant.

The Respondent appealed from this decree to the *Sudder Court at Madras*.

The appeal was heard before Messrs. *Hooper, Strange, and Baynes*, the *Sudder Court Judges*, and on the 8th of *May*, 1858, the Court delivered judgment as follows:—“The Defendant objects that the estate in question, as belonging to a Brahmin, can never escheat to the Government; and to this point, as being one of a conclusive nature, the hearing of the appeal has been confined. On the trial of the suit before the Civil Judge, a question, among others, was put by him to the Pundits of the *Sudder Adawlut*, in such a form as to elicit from them an answer to the effect

that the estates of Brahmins could not escheat to the Government; but the point appears to have escaped the Civil Judge's attention, as it is not noticed by him in his decree. The objection is met on the part of the Plaintiff by the plea, that the law which would ultimately assign the estate of an heirless Brahmin to other Brahmins, and these virtuous ones, is of too vague and uncertain a nature to be dispensed; that this law must be considered obsolete, as are other parts of the Institutes of *Menu*, from which it is derived; and that, if it be put in force, it can have respect to none but sacerdotal Brahmins. The Judges have considered these various pleas, and do not find them sustainable. It is true that, there may be difficulty in dealing with the ultimate provisions of the law of succession to Brahminical estates devoid of natural heirs, but there can be none in upholding the primary declaration that 'the property of a Brahmin shall never be taken by the King,' which, it is added emphatically, is 'a fixed law' (*Menu*, ch. IX. art. 189); and it is with this primary declaration that the Court have now to deal. That this law is an obsolete one, there is nothing to show. It is re-enforced in the current law-books, and prominently in the *Mitaschara*, (ch. II. sec. vii. art. 5), which is the authoritative and prevailing declaration of law in this part of India; and it is obvious that, while Brahmins exist in the integrity of their caste, a law regulating inheritance among them, and unchanged, must in like manner be in continued existence. The plea that the law now in question relates merely to sacerdotal Brahmins is founded in misapprehension. Whatever the occupation of a Brahmin, he is as much a Brahmin as one who devotes himself to the office of the priesthood; and the law is general as to all Brahmins, without any

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such limitation as is contended for. The term 'Priest,' it has to be observed, as the text may show, has been used in the translation of the fifth clause of the section of the *Mitaschara*, above referred to, as convertible with Brahmin, the words used in the original being '*Brahmana Dravyam*,' or 'the wealth of a Brahmin.' The Court finding thus a positive prohibition in the Hindoo law to the assumption in escheat by the ruling power, of the estate of a Brahmin, and it being allowed that the property now in question is a Brahminical estate, the Court resolve to set aside the decree of the Civil Judge, and dismiss the suit, with costs."

The Collector of *Masulipatam* appealed from this decree to Her Majesty in Council.

Mr. *Forsyth*, Q.C., and Mr. *W. H. Melvill*, for the Appellant.

Although there is no averment in the pleadings that *Veragonda Ramanapha*, the last *Zemindar* seized, was a Brahmin, or that on account of his caste the *Zemindary* could not escheat to the Government; points which by *Mad. Reg. XV. of 1816, sec. 10*, ought to have been recorded for proof in the suit, *Srimut Moottoo Vijaya Raghanadha Gowery Vallabha Perria Woodia Taver v. Rany Anga Moottoo Natchiar* (a), *Namboory Setapaty v. Kanoo-Colanoo Pullia* (b), yet, for the purpose of the argument, we will admit that he was a Brahmin, although there is no proof of that fact.

We insist, however, that the judgment cannot be sustained upon these grounds, first, that the Government was constructively in possession of the *Zemindary*, and had a good possessory title as against the

(a) 3 Moore's Ind. App. Cases, 278

(b) *Ib.* 359.

Respondent; secondly, that the Respondent had no title, inasmuch as the widow had no power by the Hindoo Law to alienate any part of the *Zemindary*; and thirdly, that the Government is in possession by escheat.

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First. The Government were put in possession by the Court under the provisions of the Act, No. XIX. of 1841, and we insist that that is a valid title, as against the Respondent, whose only right was as a mortgagee, and under the *Razeenamah*. Now, as the widow had no power to alienate the estate, the whole transaction, as affects the Government right, must fall to the ground. The Collector had no authority from the Government to recommend the widow to agree to the *Razeenamah* to save the estate from sale, and as such act was beyond the functions which devolved upon him as an executive Officer, the Government are not bound by his act, which was *ultra vires*.

Secondly; the important question really involved is, whether a childless Hindoo widow has power by the Hindoo law prevailing in *Madras* to alienate her deceased husband's estate. Our contention is, that she has no such power. According to the Books of authority and text-writers received in India, they all, without exception, negative such a power; no passage can be found in the Books which authorizes a widow to alienate her husband's estate, even if the husband had died without heirs. It must be borne in mind that there are two schools of law in India. The *Mitaschara* prevails throughout the peninsula of India. The *Daya-Bhaga* is confined to Bengal, and is, therefore, the exceptional law. Now, the *Daya-Bhaga*, though it is not the law which governs the rights of Hindoos in *Madras*, gives larger powers to widows than the *Mitaschara*, which latter authority, we sub-

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mit, governs this case upon this point. It makes no difference that she was the widow of a Brahmin. The general Hindoo law on this subject is thus stated by Sir *Thomas Strange*, "*Hindu Law*," Vol. I. p. 246 (2nd edit.): "With respect not only to what she may have inherited from her husband, but to its accumulated savings also, her duty is to regard herself as little more than tenant for life, and trustee for the next heirs, of property so possessed ; being (as already intimated) restricted from alienating it, by her sole independent act, unless for necessary subsistence, or purposes beneficial to the deceased." This interpretation of the law is confirmed by the Pundits, in the case of *Ramasamy v. Mandavilly Pariah*, referred to in *Strange's "Hindu Law,"* Vol. II. p. 408. So, in the *Daya-Bhaga* of *Jimuta Vahana*, ch. XI. sec. i. art. 56, it is laid down that "the wife must only enjoy her husband's estate after his demise. She is not entitled to make a gift, mortgage, or sale of it. Thus, *Catyayana* says, "Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it." And in the *Mitaschara*, ch. II. sec. i. art. 35, which is an authority more favourable to the widow's rights than the law received in other parts of India, it is said, that if the husband dies without male issue, his brothers take, and the widow has only an allowance for maintenance for life, as "the wife takes as much as is adequate for her subsistence, and the brethren take the rest." In *Morley's Dig.* tit. "Inheritance" 4. "of widows," Vol. I. p. 311, it is broadly laid down that "a widow succeeding to the landed estate of her husband, takes only a life interest," and he quotes numerous authorities in sup-

port of that proposition. The restriction upon the widow's power of alienation of the real estate of her husband arises from the fact that she has only a life estate. Sir *F. W. Macnaghten*, "Hindu Law," p. 9, says "widows who take an estate shall take it for life only." And so it has been determined by the Supreme Court at Calcutta, *Gopeymohun Thakoor v. Sebn Cower* (a) *Doe dem. Ramanund Mookopadhia v. Ramkissen Dutt* (b), *Doe dem. Sibnauth Roy v. Bunsook Buzzary* (c); by the Sudder Court there, *Mohun Lal Khan v. Ranee Siroomunnee* (d), *Nundkomar Rai v. Rajindurnaraen* (e), *Pokhnarain v. Mussamant Seesphool* (f); and by this Tribunal, in the case of *Keerut Sing v. Koolahul Singh* (g).

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Thirdly; the estates of a Hindoo, whether of the Brahmin or any other caste, dying without heirs, devolve on the Sovereign power, by the law, as now administered in India. [The Lord Justice *Knight Bruce*:—It would avoid further litigation if some arrangement could be made for the surrender of the *Zemindary* to Government upon payment of what is due to the Respondent.] The Indian Government, as the Sovereign power, took the *Zemindary*, in the absence of heirs of the late *Zemindar*, by escheat. Nothing can be more positive than the right of the State to take either as *ultimus hæres*, or for forfeiture, as in the case of felony (h) or treason, the estate of a Hindoo. *Mad. Reg. VII.* of

(a) Sir E. H. East, notes of decided cases, 2 Morley's Dig. p. 110.

(b) *Ib.* 219.

(c) *Ib.* 131.

(d) 2 Ben. Sud. Dew. Rep. 32.

(e) 1 Ben. Sud. Dew. Rep. 262.

(f) 3 Ben. Sud. Dew. Rep. 116.

(g) 2 Moore's Ind. App. Cases, 331.

(h) Upon this point see the case of *The Advocate-General v. Richmond*; *Oriental Cases* by Sir E. Perry, p. 566, in which the question was raised to whom the goods of a convicted felon belonged, whether to the Crown or the East India Company.

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1817, sec. 6, expressly provides for the general superintendence of all escheats, which that section directs to be vested in the Board of Revenue. That regulation was founded upon the *Ben. Reg. XIX.* of 1810, sec. 7, which is almost identical with the former Regulation, and also provides for the superintendence of escheats. *Joanna Fernandez v. Domingo de Silva(a)*, was a case of a British subject dying in India without heirs, and the *Sudder* Court held that the Government was entitled to take the lands under the provisions of the latter Regulation. If there can be any exemption in such law from the general law of escheat in favour of any class, it must be confined to the estates of Brahmins who are devoted to priestly offices, and does not apply to the *Zemindary* in question. It is true that it is laid down in the Institutes of *Menu*, ch. IX. sec. 189, that "The property of a Brahmin shall never be taken as an escheat by the King; this is fixed law: but the wealth of the other classes, on failure of all heirs, the King may take." And that principle is adopted in the *Mitaschara*, ch. II. sec. vii. art. 5. But it is impossible to receive this as an exposition of Hindoo law now received or acted upon in India. It must be treated as obsolete. Sir *Thomas Strange* says in his preface to his treatise on "Hindu Law," Vol. I. p. xiii., that the Institutes of *Menu*, though the undoubted foundation of all Hindoo law, are looked upon by Jurists "as a work to be respected, rather than, in modern times, to be implicitly followed." So *W. H. Macnaghten* "Hindu Law," Vol. I., pref. p. viii., treats of ancient Hindoo laws as obsolete at the time he wrote. But, if the question is to be tried solely by the ancient Hindoo law, if not affected by *Mad. Reg. VII.* of 1817, which we contend overrides it, then we

(a) 2 Ben. Sud. Dew. Rep. pp. 227, 230.

submit, that the exemption in such law from the Government's right to take by escheat, in favour of any class, is confined to the estates of sacerdotal Brahmins, a distinction well known and defined by the Hindoo law. *W. H. Macnaghten's "Hindoo Law,"* Vol. I. ch. V. pp. 248—263; *Strange's "Hindoo Law"* Vol. II. pp. 220, 247, where the point was distinctly raised and decided. *Mill's British India*, Vol. I. p. 185 (4 edit. by *Wilson*), gives a valuable summary of the law relating to Brahmins, showing the utter impossibility of the application of the doctrine laid down by *Menu* to the present state of society. *Wilson* says, in a note, Vol. I. p. 182, that the Brahmins, collectively, have lost all claim to the character of a priesthood, and that they form a nation following all kinds of secular avocations. How is a Brahmin property to be generally exempt from escheat? Take this test. Suppose a Brahmin committed felony, or treason, if the passage in *Menu* is to be adopted, the Crown would have no power of declaring his estate forfeited to the State. Such an anomaly could not be permitted upon the authority of a single passage in that work. If the Crown cannot take as *ultimus hæres*, who then is the heir of a Brahmin? *Menu* does not say any one Brahmin in particular, but "Brahmins who read the three *Vedas*," ch. IX. sec. 188. Such succession is utterly impracticable. *Strange's "Hindoo Law,"* Vol. I. pp. 149, 310. [2nd edit.] In any circumstances the ruling power must take, even if it be held to be subject to a trust for a Brahmin; though such a trust would be void by English law for uncertainty.

Lastly, we are not concluded by the orders or the decrees of the *Sudder* Court and the Civil Court of *Masulipatam*, in 1854, and we submit that, although the former order was not appealed from, yet that the whole

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subject at issue can be taken into consideration by the Court upon a final decree, *Sumbhoolall Girdhurlall v. The Collector of Surat* (a). No appeal lies from an Interlocutory order (b).

Sir *Hugh Cairns*, Q.C., Mr. *Ayrton*, and Mr. *Norton*
 for the Respondent.

First: Our answer to the Appellant's argument is, that there is no possessory title by the Government; on the contrary, that the Collector in advising the compromise admitted the Respondent's possessory title, and that the Government are bound by the Collector's acts. Indeed the Respondent's title is unquestionable. He was put into possession, and holds the *Zemindary* under a judgment of a Court of competent jurisdiction, made in a regular suit in which the Collector, as representing the Government, was a party, and such judgment is still in force, unimpeached and not the subject of the present appeal. *Mad. Reg. VIII. of 1818, sec. 3*, requires, that if the party is dissatisfied, an appeal should be interposed within six months, otherwise the decree stands. No appeal having been brought it is too late now to question the decree. The proceedings of the 13th of *February*, 1854, therefore, operate as an estoppel, and are a bar to the present suit. What was done under *Mad. Reg. VII. of 1817, sec. 6*, was merely an administrative act on the part of the Government as between itself and one of the Government Board of revenue. It does not in the slightest degree alter the rights of any of the parties in respect of this property. The Appellant's contention, that the Government were in possession by escheat, and that the possession decreed to the Respondent by the decree

(a) 8 Moore's Ind. App. Cases, 1.

(b) 1 Summary Cases, 113.

of the Court was *ultra vires*, cannot prevail. For if the Government taking by escheat is the next heir, then from the acts of the Collector we must assume that we have had their full assent to the alienation by the widow.

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Secondly. It is contended by the Appellant, that a childless widow is by the Hindoo law tenant for life only, and has no power of alienating immoveable estate. We submit, that such a proposition is untenable and cannot be maintained. The principle of the Hindoo Law is, that a childless widow has the whole inheritance of the estate vested in her. It is true that her rights over that inheritance are so far restricted and qualified that she cannot dispose of real estate without the consent not only of the lineal heirs of her deceased husband, but also of the collateral relations, or for a sufficient cause, such as necessary subsistence, or for purposes beneficial to her late husband, *Strange's "Hindu Law,"* Vol. I. p. 246, which operates as an alienation for the benefit of the next heir. Such alienation must, however, be with the consent of the members of the family, who are entitled to maintenance, but if there be no heirs, then the limitation, *ex necessitate*, ceases to exist. No doubt can be raised that in this case upon the death of the *Zemindar* last seized, the *Zemindary* devolved upon his widow. There is nothing known in Hindoo law analogous to the English law with respect to dower, or that by which a claimant would be simply tenant for life. The inheritance is in the widow as perfectly as what in England would be called the fee. The authorities fully support this. In the case of *Cossinaut Bysack v. Hurroosoondry Dossee* (a) Sir Edward Hyde East says, the

(a) 2 Morley's Dig. 215.

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widow has "the entire right of property vested in her, both in the moveable and immoveable estate; for there is no distinction between them taken in the Books in respect of the husband's estate devolving upon her as heir." So in the *Daya-Bhaga*, ch. XI. sec. i. art. 43, it is laid down, that "on failure of heirs down to the son's grandson, the wife, being inferior in pretensions to sons and the rest, because she performs acts spiritually beneficial to her husband from the date of her widowhood (and not like them from the moment of their birth), succeeds to the estate on their default." This exposition of the widow's right of inheritance is recognized in the case of *Pokhnarain v. Mussumaut Seesphool* (a), *Sibhoo Singh v. Pirthee Singh* (b).

Thirdly, we insist that the estate in question was, at the death of the widow, *Lutchmedavamah*, charged with the debt due to the Respondent, being mortgaged to him to secure repayment thereof, and that the right or interest of the Respondent in the *Zemindary* did not escheat to Government on the widow's decease. The question of escheat involves two considerations:—first, that although we admit that the ruling power may generally take by escheat on failure of heirs, yet an exception exists in the case of a Brahmin, and that in this case, as the *Zemindar* last seized was a Brahmin, the Government could not take, as upon his death his real and personal property must be given to a Brahmin. That is the opinion of the *Sudder Court*, founded upon the great authority of *Menu*, and unless you repudiate that authority, the law as expounded by the Pundits and adopted by the Court must prevail. *Menu*, ch. IX. art. 189, says, "The property of a Brahmin shall never be taken as an escheat by the

(a) 3 Ben. Sud. Dew. Rep. 114.

(b) 10 S. D. R. N. W. P. 415.

King; this is fixed law: but the wealth of the other classes, on failure of all heirs, the King may take." And this doctrine is fully recognized in the *Mitaschara*, in ch. II. sec. vii., "on the succession of strangers upon failure of the kindred." In art. 3 it is laid down that a learned priest is heir; according to *Gautama*, 28, 29; and art. 4 of that section states, generally, any Brahmin who has read the three *Vedas*, as *Menu* has declared; and so in art. 5, where it is unequivocally declared that "Never shall a King take the wealth of a priest; for the text of *Menu* forbids it: The property of a Brahmin shall never be taken by a King: this is fixed law. It is also declared by *Nareda*, If there be no heir of a Brahmin's wealth, on his demise, it must be given to a Brahmin, otherwise the King is tainted with sin;" and so it is laid down by *Strange*, "Hindu Law," Vol. I. p. 149. Secondly, if the Government took by escheat as the *ultimus hæres*, then the act of the Government officer is binding, as it shows the full consent of the Government to the alienation by the widow. Nothing is to be found in the pleadings to show that the Government impeached it on that ground, which they were bound to have done if they depend upon their right by escheat.

But, lastly, the Government in no circumstances can have a right to the estate sought to be recovered until the Respondent's claims have been discharged. It is a simple case of a mortgagee endeavouring to recover back money, which it is admitted he had advanced for the benefit of the *Zemindary*.

Judgment was reserved, and now delivered by

The Lord Justice KNIGHT BRUCE.

Of the various questions that have arisen in this case, the only one which appears to have been argued

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in the *Sudder Dewanny Adawlut* at Madras, and certainly the only one decided by that Court, is, whether, on the death of a Brahmin without heirs, the Sovereign power in British India is entitled to take his estate by escheat. The decision of the *Sudder* Court upon this question strikes at the root of the Appellant's title; and its correctness is, therefore, the first thing to be now considered.

The learned Judges of the *Sudder Dewanny Adawlut* have treated the question as one to be determined merely by Hindoo law; and recognizing the general right of the Crown or other ruling power by escheat when there is a failure of heirs, have adopted and enforced an exception as to the property of Brahmins, which is supposed to result from certain texts in *Menu* and other ancient authorities. The arguments addressed to us have also assumed the applicability of the Hindoo law; and their Lordships, therefore, propose to deal primarily with the question, whether that law, as it now obtains in British India, has, if applicable to the case, been properly held to be fatal to the Appellant's title.

For the exposition of the Hindoo law on the point, it is unnecessary to go back further than the *Mitashara*. That treatise, the highest authority on the law of inheritance in the part of India where the *Zemindary*, the subject of this suit, is situate, comprises, amongst other authorities, the passage of *Menu* which is principally relied upon. It is, however, from the consideration of the whole chapter of the work, and of the different authorities which are there collected, taken together, that we are most likely to arrive at a right conception of the law.

The important passages are in articles 3, 4, and 5, of chapter II., section vii.

From these it would appear that the beneficial enjoyment of a Brahmin's property ought not on his death without heirs to pass to the King; that it ought, in some way or another, to pass to other Brahmins. But the texts also show that it is not to pass to Brahmins generally, or even to any definite or well-ascertained class of them. The persons to take the beneficial interest are to be Brahmins having certain spiritual qualifications; they are to be pure in body and mind, and are to have read the three *Vedas*. If this be the law, it seems to imply a power of selection; and a right of possession, at least intermediate, of the property in somebody. It cannot be supposed that the first Brahmin who could lay hands upon the property of a member of his caste dying without heirs was to hold it, subject, perhaps, to the condition of showing that he possessed the personal qualifications which the law requires.

It appears to their Lordships, that the passage quoted by the *Mitaschara* from *Nareda*, in the very section which cites the prohibition of *Menu*, shows what the law in its utmost strictness was. That passage is—"If there be no heir of a *Brahmana*'s wealth, on his demise it must be given to a *Brahmana*. Otherwise the King is tainted with sin." In other words, the King is to take the property, but to take it subject to the duty, which he cannot neglect without sin, of disposing of it at his discretion amongst Brahmins of the kind contemplated by the preceding texts.

If this be so, it appears to their Lordships that, according to Hindoo law, the title of the King by escheat to the property of a Brahmin dying without heirs ought, as in any other case, to prevail against

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any claimant who cannot show a better title; and that the only question that arises upon the authorities is, whether Brahminical property so taken is, in the hands of the King, subject to a trust in favour of Brahmins. In this suit, where the issue is between the Government claiming the property (whether subject to a trust or not), by escheat, and a party claiming by an adverse title, it is unnecessary to decide whether the duty imposed upon the King is one of imperfect obligation, or a positive trust affecting the property in his hands, or whether, if a trust, it is or is not one incapable of enforcement by reason of the uncertainty of its objects. It is also unnecessary to decide on the arguments addressed to us concerning a distinction, or supposed distinction, between the Brahmins who have been called "Sacerdotal Brahmins" and the ordinary members of the caste. For, assuming that the Appellant's title is to be governed by Hindoo law, and assuming that there is no valid distinction in this matter between sacerdotal and other Brahmins, their Lordships, for the reasons above stated, would be unable to concur in the judgment under review.

Their Lordships, however, are not satisfied that the *Sudder* Court was not in error when it treated the Appellant's claim as wholly and merely determinable by Hindoo law. They conceive that the title which he sets up may rest on grounds of general or universal law.

The last owner of the property in question in this suit derived her title under an express grant from the Government to her husband, a Brahmin, whom she succeeded as heiress-at-law. If, upon her death, there had been any heirs of her husband, those heirs

must have been ascertained by the principles of the Hindoo law; but by reason of the prevalence of a state of law in the *Mofussil* which renders the ascertainment of the heirs to take on the death of an owner of property, a question substantially dependent on the *status* of that owner. Thus the property being originally, and remaining, alienable, might have passed by acts *inter vivos* in succession to British subject, to foreign European owner, to Armenian, to Jew, to Hindoo, to Mahometan, to Parsee, or to any other person, whatever his race, religion, or country. According to the law administered by the Provincial Courts of British India, on the death of any owner, being absolute owner, any question touching the inheritance from him of his property is determinable in a manner personal to the last owner. This system is made the rule for Hindoos and Mahomedans by positive regulation; in other cases it rests upon the course of judicial decisions. But when it is made out clearly that by the law applicable to the last owner, there is a total failure of heirs, then the claim to the land ceases (we apprehend) to be subject to any such personal law; and as all property not dedicated to certain religious trusts must have some legal owner, and there can be, legally speaking, no unowned property, the law of escheat intervenes and prevails, and is adopted generally in all the Courts of the country alike. Private ownership not existing, the State must be owner as ultimate Lord. Consequently, the claim of the Government, in the present instance, might have been considered with reference to this principle.

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question arose whether an alien could hold lands in British India. Some of those lands were without the bounds of a Presidency town. It was decided, on appeal here, that that part of the law of England which disabled an alien from holding land against the claim of the Crown had not been introduced into India; but the reasons and principles of the decision do not appear to their Lordships to be inconsistent with the view that they take of the present controversy.

In the present case, if the Hindoo law had expressly provided that, upon the death of a Brahmin without heirs, ordinarily so-called, his property should pass to some definite person or class of persons; if, for instance, it admitted, in the case of a Brahminical succession, collaterals more remote than it would admit in the case of succession to a *Soodra*, there would be ground for excluding the title of the Crown, because there would, by Hindoo law, be some person in the nature of an heir capable of succeeding; but here the *Sudder Dewanny Adawlut* rests its decision on what it terms "the primary declaration of *Menu* that the property of a Brahmin shall never be taken by the King;" That declaration is contained in an article (see *Menu*, ch. IX. art. 189) which, assuming a complete failure of heirs, negatives the King's right to Brahminical property, whilst it affirms his title to the wealth of all other classes in such circumstances. In so dealing with the question, the *Sudder Court* was, we think, applying the actual or supposed Hindoo law, in derogation of the general right of the British Sovereignty.

Their Lordships' opinion is in favour of the general right of the Crown to take by escheat the land of a

Hindoo subject, though a Brahmin, dying without heirs; and they think that the claim of the Appellant to the *Zemindary* in question (subject, or not subject, to a trust) ought to prevail, unless it has been absolutely, or to the extent of a valid and subsisting charge, defeated by the acts of the widow, *Lutchmedavamah*, in her lifetime. In the latter case, the Government will, of course, be entitled to the property subject to the charge.

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It follows that the decree of the *Sudder Adawlut* cannot stand. The manner in which it ought to be varied depends upon the decision of the questions which have been raised on this appeal touching the effect of the acts of *Lutchmedavamah* in her lifetime. On none of these has the *Sudder Adawlut* adjudicated. On some of them, as, for instance, the effect of the Collector's acts in 1841, it is particularly desirable to have the judgment of that Court. Again, it appears to their Lordships very doubtful whether the present record affords the materials requisite for the satisfactory decision of some of those questions. There is little, if any, legal evidence of the nature of the advances made to the widow, or of the necessity for them. It may be also material to know what was the nature and what the effect of the proceedings by which the execution of the *Razeenamah* was suspended. In these circumstances, their Lordships, though they would have been glad to determine, if they could, this long litigation by a final decree, do not feel that they can safely do more than remit the case to the *Sudder Adawlut* for further hearing, with a declaration that the general right of the Government by escheat (subject, or not subject, to a trust) has been established. It is right, however, to state further their

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Lordships' opinion, that the proceedings of the *Sudder Adawlut*, under the dates of the 27th of *October*, 1853, and the 21st of *October*, 1854, do not constitute any bar to the title of the Appellant in this suit; but that they do amount to an award of possession, with which, in the present state of the cause, and until its final adjudication, their Lordships will not interfere.

Their Lordships desire again to suggest, for the consideration of the parties, that some arrangement for the surrender of the *Zemindary* to Government, upon payment of what is due to the Respondent for the advances actually made, would probably meet the real justice of the case, and save both parties from protracted litigation.

There will be no costs of this appeal. The costs in India will be dealt with by the Court to whom the cause is remitted.

It is remitted with the declaration as to the right of the Crown by escheat, without touching the question of trust, or no trust (a).

(a) See the further report of this case, next page.

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On appeal from the Sudder Adawlut at Madras.

Hindu Law—Widow—Estate taken by—Nature and incidents of—Alienation—When binding—Necessity—Burden of Proof—Crown taking estate by escheat—Right of, to impeach alienation by widow—Estoppel—Principles of—Collector—Acts of, in excess of authority—Government if estopped by—Hindu Law—Texts—Opinion of Pundits at variance with—Value of.

By the Hindoo Law of inheritance, a childless widow takes as heir, but it is only a special and qualified estate.

If there be collateral heirs of the husband, the widow cannot alien the property except for special purposes, such as for religious or charitable objects, or those acts which are supposed to conduce to the spiritual welfare of her husband, in which circumstances she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the latter purpose, she must show actual necessity.

The restrictions imposed by the Hindoo Law on a widow's power of alienation of her husband's estate are inseparable from her estate, and do not depend on the existence of heirs capable of taking on her death.

When the Crown takes by escheat for want of heirs, it has the same right to impeach an unauthorized alienation by the widow, which the heirs of the husband (had there been any) would have had.

The acts of a Government Officer bind the Government only when he is acting in the discharge of a certain duty within the limits of his authority, or if he exceed that authority, when the Government in fact, or in law, directly, or by implication, ratifies the excess.

Circumstances in which it was held that, a Government Officer had no authority to waive the rights to which the Government might be entitled by escheat, and that a decree founded thereon by a Court in India did not operate as an estoppel against the Crown.

The rule laid down in the case of *Myna Boyce v. Ootoram* (*antè*, p. 400), that an opinion of the Pundits, apparently discordant from works of current and established authority upon Hindoo Law, given in the absence of authorities, or of local usage, is not to be received as conclusive upon the question at issue without further investigation, approved of.

In the first appeal in this case, the question then raised, the right of the Appellant to seize an estate

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* Present: Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge.

Assessors,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colville.

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in his collectorate as an escheat to the Government for want of an heir to the person last possessed, their Lordships decided in favour of the general right of the Crown to take by escheat the estate in question, subject, or not subject, to a trust, and remitted the case to the *Sudder Dewanny Adawlut* for further hearing, with the expression of their opinion, that there was not sufficient evidence in the case to admit of a satisfactory decision on the subject of the trust and the claims under it.

The suit accordingly was again brought before the *Sudder Dewanny Adawlut* on the 20th of October, 1860, and, on the 22nd of the same month, that Court delivered judgment, whereby, after stating that the Court had ascertained from the parties that they were not in a position to come to an arrangement in accordance with their Lordships' suggestions, but wished the suit to proceed, and that the Court "had not found it necessary towards their pronouncing upon the merits of the suit to call for the additional evidence which their Lordships had indicated as apparently requisite," the judgment of the Court proceeded in these terms: "The arguments brought before the Court have led them to consider, primarily, what may be the rights of the Crown by the law of escheat, especially as connected with the powers of a female, under Hindoo law, to alienate property. In view of the circumstances under which the right of the Crown to an escheat, in reference to the particular estate in litigation, has been declared by their Lordships of the Privy Council, any clause of the Hindoo law, 'actual or supposed,' notwithstanding, the Court have felt it incumbent on them to judge of the law of escheat in the most general aspect; and, towards forming an

opinion on the subject, they have admitted the arguments of Counsel, based upon the bearings of the law as recognized in the Courts in England, besides taking into consideration the state of the law as existing in this part of India, which it is their more peculiar province to deal with. It has been pressed upon the Court, that by English law, title by escheat does not confer the powers belonging to title by heirship. The Lord paramount, it is declared, always takes to his own disadvantage, *Burgess v. Wheate* (1 Sir W. Black. 123). There a trustee held property, and those for whose benefit it had been intrusted to him had lapsed, the Crown was declared not entitled to deprive the trustee of the possession as having escheated to it, 2 *Spence*, 'Equi. Juris.' p. 266; *Taylor v. Haygarth* (14 Sim. 16, 7). It has been also ruled, in the case of property held under mortgage, the heirs of the mortgagor being extinct, that the Crown cannot exercise the equity of redemption, *Burgess v. Wheate*; *Jeremy*, 'Equi. Juris.' p. 182; 2 *Spence*, 'Equi. Juris,' 237; *Taylor v. Haygarth*; *Prescott v. Tyler* (1 Jurist, 470). Also, that the Crown cannot enforce forfeiture upon breach of condition, *Burgess v. Wheate*. The Hindoo law is here analogous. Had the last undisputed owner of the *Zemindary* in issue been a male, without male progeny, he could have alienated the estate at any moment before his death, whether with or without consideration, and no collateral could have questioned the act. By consequence, the Crown could not do so. The last owner having been a female, the power to alienate in her was placed by the law under certain special restrictions—that is, though destitute of direct lineage, she could not alienate to the prejudice of her remotest heirs,

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save under their consent, or under strict necessity. In the present suit, the Crown claim to possess the restrictive power belonging to an heir of the female, and have laid this suit to defeat her act. The Court have consulted their Pundits on the occasion, and their declaration is to the effect that the limitations under which a female is placed are exclusively for protection of the interests of her heirs—meaning thereby her kindred—or those of her husband; that failing all such heirs, the provision does not extend to the protection of the interests of the ruling power as coming in by escheat; and that in regard to the ruling power, the female is absolutely free, being at liberty to alienate without seeking its consent, and irrespective of its ulterior rights. Among the authorities quoted by the Pundits in support of their view of the law, they have referred to *Mitaschara*, ch. I. sec. i. art. 2, where the following definition appears:—‘The term heritage (*Daya*) signifies that wealth, which becomes the property of another, solely by reason of relation to the owner.’ This being the treatise under which rights in property are governed among Hindoos in this part of India, the *dictum* must be received as of high authority; and it obviously governs all those parts of the treatise which relate to the limitation under which females are placed in respect of those who are to take the ‘heritage’ after them—that is, ‘the heirs,’ or, as the original is, the ‘*Dayadies*.’ The limitations are thus for protection of those to whom the property is to come in right of kindred; and here the Crown, as the ultimate possible successor, is not in question. Accordingly, it is the consent of the ‘*Dayadies*’ that must be secured by the female before she can alienate, save under strict

necessity, and the consent of the Crown is unessential. Community of right in property among the Hindoos is ever dependent upon community in blood, and the possible ultimate appropriation by the Crown rests upon quite another basis. It is where there is no 'heir' only, that the Crown comes in, and obviously as universal landlord, where no individual rights exist, and for the avoidance of the disputations and disturbance which would arise were unclaimed property left, without provision of law, to be seized upon by the strongest or the most active. This the Court consider to be the principle of the law of escheat. Under it, the Crown could probably defeat the possession of any heirless property obtained by fraud upon the previous owner, and certainly any that had been secured by mere seizure without pretence of right; but where there is an assignment by the former owner, the Crown cannot take the place of an heir to challenge the power of the individual to effect the assignment, and undo the act. It is upon the presumption that the Crown has thus the power to challenge and defeat the act of the last incumbent that this suit has been brought, and on the ground that the Crown, by the law of escheat, has no such power, the suit should be dismissed. Another bar to the suit, it appears to the Court, is created by the Collector's act in 1841, to which their Lordships of the Privy Council advert. The Defendant was in process of putting in execution the decree held by him, and was about to have his claim satisfied by sale of the *Zemindary*, as provided for in the decree. The execution was intrusted by the Court to the Collector to enforce, when he gave that counsel to the debtor, *Lutchmedavamah*, which

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led to the execution of the *Razeenamah* on which the Defendant founds his title. The terms of the *Razeenamah* were immediately communicated to the Collector, and the execution dropped. The Collector held office in more capacities than one. As respected the enforcement of the decree, he was acting as the *Nazir*, or executive officer, of the Court; otherwise, in his ordinary position, he was the agent or representative of the Government in his District. It appears clear to the Court that, in advising *Lutchmedavamah* to come to some terms settling upon any conditions with the creditor, so as to save the estate from sale, the Collector was dealing with the matter in a manner beyond the functions devolving on him as executive officer of the Court, and was acting in the capacity proper to him as agent of the Government. It is the policy of the Government to save from peremptory sale the possessions of landlords, and especially those important estates known as *Zemindaries*; and there can be little doubt that it was owing to the interest thus felt in *Lutchmedavamah* as a *Zemindar* that the advice in any way to save her property from being brought to auction was given, together with the respite necessary for the purpose. The terms into which *Lutchmedavamah* entered with her creditor, in pursuance of the above advice, were such as to allow of the estate eventually vesting in him. The Collector, after being made aware of these terms, offered no objection thereto. On the contrary, he gave effect to the arrangement, and so indorsed it, by dropping the execution. It would be altogether inadmissible that the Collector, individually, after the condition of lapse to the creditor had become effectual, should appear and protest against the arrangement, and seek to de-

feat it on the plea that it was made without his consent and against his interests; and it is equally inadmissible that his principal, the Government, should do so. The Court are of opinion, therefore, that, supposing the consent of the ruling power to the alienation by *Lutchmedavamah* were necessary, the suit should be dismissed on the ground that such consent was in effect obtained. But even if it might be admitted that the Government could now challenge the alienation in question, it appears to the Court that the plaintiff takes up no ground on which the act can be called in question. The Defendant held a decree, in which it was found, upon evidence taken, that the debt was one actually incurred by *Lutchmedavamah*, and of a nature to be fairly and legally chargeable upon the estate. To defeat that decree the Plaintiff had to subvert the facts found, by showing that the judgment was one obtained fraudulently and collusively; that the debt was not a *bona fide* one, or that the obligation was of a character such as to render it not chargeable on the estate. In the plaintiff no such grounds are taken. The plaintiff, in fact, is founded upon a wrong view of the law, being to this purport:—‘Let the obligation be of what character it will, it is not chargeable upon the estate, as a female can, under no circumstances, alienate her property in which she holds but a life interest.’ Now, it is well known, and certainly not disputed at the hearing of this appeal, that a female may alienate her property absolutely, if for relief of necessities. There can be no more admissible necessity than the obligation to meet the *Peishcush* or Government demand, failing discharge of which the estate would be peremptorily sold, and lost both to the occupant and her heirs.

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Advances for *Peishcush* are represented to have formed an essential part of the debt incurred by *Lutchmedavamah*. The fact was so found in the decree held by the Defendant, and the plaint discloses that the Plaintiff was aware, as in truth he was bound to be, that such was the alleged character of the debt. Yet there is no denial that the debt was thus incurred. On the contrary, the Civil Judge who had the conduct of the actual examination of the case, states, in his judgment, that 'the justice or otherwise of the claim in original suit, No. 18 of 1838, is in no way called in question in the present case.' True it is, the Civil Judge adds, that 'the suit is alluded to as having been a collusive one,' but where he has met with such collusion the Court fails to discover. The claim itself being taken as a just one, how the suit can have been a collusive one is not apparent. Possibly the fact of the suit having been undefended is all that is pointed to. From all these grounds, the Court come to the conclusion that the plaint has alleged nothing in consideration of which the assignment by *Lutchmedavamah* to the Defendant can be called in question. It has been maintained, on the part of the Plaintiff, at the hearing of this appeal, that the burden of sustaining the legality of the assignment rested upon the Defendant. The Court think otherwise. First, as before observed, he held a decree sustaining the basis of the assignment, and it was for the objector to show something by which that decree could be overthrown. Nothing of the sort having been shown, the Defendant may rest upon his decree. Secondly, even supposing there had been no decree, or that the decree obtained cannot be pleaded, the obligation in question was not incurred

with the Defendant, but with his father. It sprang from transactions originating, as the decree held by him shows, in 1813, and continued to 1838, and remaining unchallenged, so far as this Plaintiff is concerned, until the filing of this suit in 1855, even if this suit can be said to have called them in question. The father, in 1831, obtained assurance for the debt by the bond in favour of which the said decree was given, and the Defendant, in 1841, entered upon the fresh transaction, on the basis of the previous obligation, which it is the design of this suit to set aside. The Defendant would be placed at a great disadvantage, were the maintenance of his position to be dependent upon his producing antiquated testimony of transactions long ago concluded, and not personally so by himself—evidence which may by this time have been extinguished, or otherwise placed beyond his reach. The Court think, therefore, that where such a transaction as that now in question is challenged, the burden of showing cause against it rests with the challenger. In this opinion, the Court find themselves supported by a judgment of the Privy Council. In deciding upon a case, where the heir sought to free his estate of liability for a charge incurred by the previous incumbent as his guardian, their Lordships observed,—‘It is obvious, however, that it might be unreasonable to require such proof from one not an original party (*i.e.*, the creditor) after a lapse of time, and enjoyment and apparent acquiescence; consequently, if, as is the case here as to part of the charge, it be created by substitution of a new security for an older one, where the consideration for the older one was an old precedent debt of an ancestor not previously ques-

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tioned, a presumption of the kind contended for by the Appellant (the creditor, namely, that the obligation formed a valid charge) would be reasonable.' *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree* (6 Moore's Ind. App. Cases, 420). The burden of proving, therefore, whatever might be necessary to free the estate in issue of its liability to the Defendant, has rested upon the Plaintiff. It is apparent that no sort of proof of the nature in question has been adduced by him. He has contented himself with filing four exhibits, which are irrelevant to the transaction in issue, and produced no witnesses. The judgment of the Privy Council, above referred to, enables the Court to meet another plea that has been taken in behalf of the Plaintiff; namely, that admitting the obligation incurred by *Lutchmedavamah* to have been of a character whereby the estate could be charged, the resources of the estate were so ample that it could only have been by dissipating them that she could have fallen under any necessity to incur debt, and that, consequently, the estate cannot be charged with such debt. The Court have already observed that the liability for *Peishcush*, to meet which the obligation in question was in part, and presumedly in chief part, incurred, was one of a nature so urgent, that when it arose, had it not been met, the estate would have been sold and lost to all interested in it. To pronounce the estate when thus redeemed from risk not liable for the money advanced for its redemption would, under any circumstances, in the opinion of the Court, be unjust, and the prevalence of such a principle would, it may be remarked, jeopardize every estate incurring similar risk; but, in the judgment of the Privy Council adverted to, it is laid down that a

creditor is ordinarily not to be prejudiced by the previous waste, which may have led to the necessity which he relieves—‘Where,’ their Lordships observe, ‘the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded.’ *Munoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree* (6 Moore’s Ind. App. Cases, 423). Upon every ground above taken, the Court resolve, in reversal of the decree below, to dismiss the suit with costs:—first, because the law of escheat does not give the Plaintiff the power to question the assignment objected to; secondly, because the Plaintiff acquiesced in this assignment when made; thirdly, because the burden of showing cause against the assignment rested upon the Plaintiff, had he been in a position to challenge the same, and no such cause has been shown by him, or even alleged.”

From this judgment the Collector of *Masulipatam* again appealed.

Mr. *Forsyth*, Q.C., and Mr. *W. H. Melvill* for the Appellant.

By the former judgment of this Tribunal the right of the Government to the *Zemindary* in question to take by escheat was established, unless it had been absolutely, or to the extent of a valid and subsisting charge, been defeated by the acts of the widow, *Lutchmedavamah*, in her lifetime. No such valid acts have been established in evidence. The case must be considered under two heads. First, the power of the

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widow by the Hindoo law, to alienate as she has done, and, secondly, whether the acts of the Collector affect the rights of the Government.

Upon the first point we insist, that she had no power to dispose of or mortgage the *Zemindary*, or do any act charging the *Zemindary*, except to raise money for certain necessary purposes as defined by the Hindoo law. A widow has not an absolute proprietary right in her husband's property, nor can she in strictness even be called tenant for life. *W. H. Macnaghten*, "Hindu Law," Vol. I. pp. 19, 20. No such purposes as allow her to charge the *Zemindary* were proved to exist in the present case. It has not been established that the advances were to pay the husband's debts or the Government revenue. The Respondent has been challenged to sustain such a case, but he failed to do so. The restrictions upon her alienation are defined in the *Mitaschara*, ch. I. sec. i. art. 20. *Colebrooke's Dig.*, Vol. III. pp. 457-8, 467. [Sir *Lawrence Peel* referred to the case of *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree(a)*.] That was the case of a manager acting for an infant heir. The authorities are collected in *Morley's Dig.* Vol. I. tit. "Inheritance," p. 311; *Id.* Vol. II. pp. 110, 111, 131. *Steele's* "Law and custom of Hindoo Castes," pp. 42, 69. *Strange's* "Manual of Hindu Law," pp. 29, 30 [edit. 1856]. *Madras Appeal suits*, p. 453. *Bengal Decisions* of 1859, p. 567, *Keerut Sing v. Koolahul Sing (b)*.

Secondly. It was established that the Government, through the then Collector, and through the Board of Revenue, expressly refused to allow *Lutchmedavamah* to dispose of the *Zemindary*, and such refusal

(a) 6 Moore's Ind. App. Cases, 393.

(b) 2 Moore's Ind. App. Cases, 334.

was never actually or constructively withdrawn. Even admitting that there was a valid charge on the estate, as the Government never consented to the creation of the charge, they are not bound by the act of the Collector. His advice to her related to her life interest. How can the Respondent's interest be damaged, as her life interest only could have been sold under the decree? But as the Government were not parties to the suit in 1838, the acts of the then Collector, in 1841, as respects the enforcement of the decree made in such suit, were not such as to affect or waive the rights of the Government. [Sir *Lawrence Peel*: It does not appear that the Collector knew that there was a failure of heirs.] There has been a miscarriage. The *Sudder* Court ought, in conformity with the direction of this Court when the first appeal was before them, to have called for evidence to show the nature of the advances alleged to have been made to the widow, and the necessity for the same.

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Sir *Hugh Cairns*, Q.C., Mr. *Ayrton*, and Mr. *Norton* for the Respondent.

It must be taken as a fact that in the years 1830 and 1831 the Government were aware of their rights as escheators, and the Government should then have repudiated the proposed compromise by the widow and her creditor; but, on the contrary, Government by the Collector proposed and acquiesced in the *Razeenamah*, and they are, therefore, bound by his acts, *Sumbhoolall Girdhurlall v. The Collector of Surat* (a). In such circumstances the rights of the Respondent, under the decree of 1838, and the sub-

(a) 8 Moore's Ind. App. Cases, 1.

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sequent *Razeenamah* and Order made in that suit, could not be questioned by the Government claiming title by escheat. Again, the suit now under appeal was not instituted, nor was any evidence adduced by the Appellant, to impeach the *bona fides* of the decree of 1838, and the *Razeenamah*. Assuming, therefore, that the consent of Government to the alienation by the widow, in the absence of heirs, was necessary, that consent has in point of fact been given in a form which cannot afterwards be retracted, and that is one of the grounds which the Court has decided in the Respondent's favour.

The question whether the widow could by her own absolute authority alienate without the consent of the Crown, taking by escheat, was left open by the judgment of your Lordships. Now, the first principle of Hindoo law is, that the property is supposed to belong to the family and held by one of the family for the benefit of the other members of that family, and that law, as to descent of immoveable property, is, that it descends from father to son. The widow takes no estate if there is a son. There is nothing like a life estate known by that law, and, therefore, it is reasoning by false analogy to compare an estate for life by the English law with a Hindoo widow's rights, which error arose from the earlier English Judges using that phrase with respect to the widow's estate. The system of restriction of alienation does not apply to widows only, it applies to all holders of property. If a father has no son, he can alienate by deed; but if he has male heirs, he cannot without their consent. Neither can he, if he has daughters, deprive them of their right to maintenance, which, like the widow, is chargeable

on the property. By the Hindoo law the whole estate descends upon the widow as heir, in the absence of sons, although her power of alienation is restricted where there are heirs. If there are no heirs she can absolutely dispose of the estate. The *Mitaschara*, ch. II. sec. i. art. 39. In *Sibhoo Singh v. Pirthee Singh* (a), the validity of such an alienation was upheld. All that the authorities cited by the Appellant, upon this branch of the case affirm, is this, that where there are heirs, alienation by the widow cannot be made without their consent. In the present case there are no heirs, and she has, therefore, an absolute power of alienation.

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Lastly, we insist that there is sufficient proof of the advances made to the widow mentioned in the *Razeenamah*, and it would operate inequitably if the Respondent is after this distance of time to prove the advances made for the purposes of the *Zemindary*. It cannot be questioned after the decision of this Tribunal that a manager has power to charge this *Zemindary*, to preserve the estate, *Hunoomanpersaud Panday v. Mussamat Babooee Munraj Koonweree* (b), and so by a widow, *Chetty Colum Comara Venkatachella Reddyer v. Rajah Rungasawmy Jyengar Bahadoor* (c). If the Crown is heir, it could not be as a member of the family; and the title accrued when the husband died, not the widow; and, as the Collector advised the widow to execute the *Razeenamah*, it cannot now avoid the transaction. In *Burgess v. Wheale* (d), it was held that the Crown coming in by escheat cannot avoid a transaction which the heir claiming by right of inheritance has done.

(a) 10 S. D. R., N. W. P. 420. (b) 6 Moore's Ind. App. Cases, 293.

(c) 8 Moore's Ind. App. Cases, 319. (d) 1 Sir W. Black., 123.

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Mr. *Forysth*, Q.C., replied.

Their Lordships' judgment was pronounced by

The Lord Justice TURNER.

This cause has come before their Lordships on appeal for the second time. They regret to find that they are still without the means of satisfactorily determining the long litigation between the parties.

The *Zemindary* which is the subject of the suit was claimed by the Appellant on behalf of the Government of *Madras*, as an escheat to which the Crown became entitled on the death of the widow of the last male *Zemindar*, of whom there were no heirs in remainder to the widow; and he claimed to have it free and discharged from all incumbrances with which it had been charged by the widow during her enjoyment of it.

The Respondent disputed the right of the Crown to take the particular property by escheat in any circumstances; and insisted that, even if that right existed, he had a title to the *Zemindary* paramount to that of the Crown by virtue of a *Razeenamah* executed in his favour by the widow in her lifetime. His case as to this was, that his father had made advances to the widow for some of the purposes which, under the Hindoo law, justify the alienation by a widow of immoveable property inherited from her husband, and had obtained a decree for the amount of the debt; that after his father's death he had taken out execution on that decree, and that to stay his execution the *Razeenamah* had been executed. He further contended that this had been done with the sanction and under the advice of the then Collector of the District, and that the Government was

estopped from disputing the transaction, if it could otherwise have done so, by the conduct of its officer.

The *Razeenamah* was in the nature of an agreement for the payment of the judgment debt by instalments, with stipulations that if default were made in the payment of any instalment, the whole sum should become due, and that the judgment creditor should be put into possession of twelve out of the fourteen villages comprising the *Zemindary* (which were to be impledged to him), and should, on her death, take possession of the two other villages, and hold the whole *Zemindary* as his absolute estate. No instalment was paid by the widow, nor yet was possession taken under the *Razeenamah* in her lifetime. The Respondent, however, alleged that it was by reason of an order of the *Sudder Court*, suspending the execution of the *Razeenamah*, in consequence of proceedings in another suit, that he failed to get possession.

It follows from this statement that the questions to be determined in the cause were, whether the Crown had any title by escheat to the lands; and if so, whether that title had been defeated, either absolutely or to the extent of any subsisting charge, by the acts of the widow in her lifetime. The latter question involved the consideration of the powers of a Hindoo female taking her husband's estate by inheritance, and whether the transaction relied upon by the Respondent was an act done *bona fide* in the exercise of her powers, or a mere colourable contrivance for transferring the property to the Respondent in spite of her disabilities.

In the judgment of the *Sudder Adawlut*, which was the subject of the first appeal, the Court had

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dealt with the first of these questions only. It held that the property having belonged to a Brahminical family the Crown had no right to take it by escheat, though on the clearest failure of heirs; and therefore dismissed the suit on that ground, without adjudicating upon the other questions raised in it.

Upon the appeal, however, the whole case was more or less fully argued. Their Lordships came to the conclusion that the judgment of the *Sudder Adawlut* was erroneous; that the Crown was entitled to take the property of a Brahmin, as of any other Hindoo subject dying without heirs; and that the question whether such property would be subject, in the hands of the Crown, to any trust in favour of Brahmins, that would be capable of enforcement, was one which could not be determined in that suit. After stating their reasons for this conclusion, their Lordships' judgment proceeded thus:—"Their Lordships' opinion is in favour of the general right of the Crown to take by escheat the land of a Hindoo subject, though a Brahmin, dying without heirs; and they think that the claim of the Appellant to the *Zemindary* in question (subject or not subject to a trust) ought to prevail, unless it has been absolutely, or to the extent of a valid and subsisting charge, defeated by the acts of the widow in her lifetime. In the latter case the Government will, of course, be entitled to the property subject to the charge. It follows that the decree of the *Sudder Adawlut* cannot stand. The manner in which it ought to be varied depends upon the decision of the questions which have been raised touching the acts of *Lutchmedavamah* in her lifetime. On none of these has the *Sudder Adawlut* adjudicated. On some of them, as, for instance, the

effect of the Collector's act in 1841, it is peculiarly desirable to have the judgment of that Court. Again, it appears to their Lordships very doubtful whether the present record affords the materials requisite for the satisfactory decision of some of those questions. There is little, if any, legal evidence of the nature of the advances made to the widow, or of the necessity for them. It may also be material to know what was the nature, and what the effect of the proceedings by which the execution of the *Razeenamah* was suspended. In these circumstances, their Lordships do not feel that they can safely do more than remit the appeal to the *Sudder Adawlut* for further hearing, with a declaration that the general right of the Government by escheat (subject or not subject to a trust) has been established."

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Their Lordships also suggested to the parties the expediency of compromising the suit upon some such terms as the surrender of the *Zemindary* to Government upon payment of what might be due to the Respondent for the advances really made.

Upon the recommendation of their Lordships an Order was made by Her Majesty in Council, in *July*, 1860, pursuant to their judgment, and remitting the cause to the *Sudder Adawlut*.

The case went back to *Madras*, and was re-heard by the *Sudder Adawlut* there. In the judgment pronounced on the 22nd of *October*, 1860, the Judges stated that they had ascertained that both parties having failed to come to an agreement, wished the suit to proceed. They further stated that they had not found it necessary towards their pronouncing upon the merits of the suit, to call for the additional evidence which their Lordships had indicated as appa-

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rently requisite. They accordingly proceeded to deal with the merits of the suit in the following way:— Admitting the right of the Crown to take by escheat property of which the last owner died without heirs, they held that where there had been an assignment by that owner, though a female, the Crown could not take the place of an heir to challenge her power to make that assignment. They, therefore, decided that the suit, having been brought upon the erroneous assumption that the Crown had the power to challenge and defeat the act of the last incumbent, should be dismissed.

They next decided that, even if the Crown had the right contended for, it was estopped from asserting it by the acts of the Collector, and the sanction given by him to the *Razeenamah* of 1841.

They, lastly, decided that, even if the Crown could now challenge the alienation in question, the plaint had not been properly framed for that purpose.

It is with the appeal against this judgment that their Lordships have now to deal.

It has been argued for the Appellant that in ruling the first and third of these points the Court below has exceeded its powers, inasmuch as it has come to conclusions inconsistent with those expressed in or implied by Her Majesty's Order of *July*, 1860. In their Lordships' opinion, this objection is well founded. The Order of 1860, which, after argument here, recommended, if it did not enjoin, the Court below to take additional evidence on the question whether the acts of the widow in her lifetime were valid against the Crown, must be taken to assume that the question was one fairly open to the parties upon the pleadings.

Again, the declaration that the general right of the Crown to take the property by escheat ought to prevail, unless it had been defeated by the acts of the widow in her lifetime, when followed by the direction to adjudicate upon those acts, seems to imply a decision that the Crown had established its right to maintain a suit of this nature.

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The first conclusion of the *Sudder Adawlut*, however, involves a question of substance—an important question of law; and if their Lordships were satisfied that it was well founded, they would be disposed to prevent its being met by the objection, in some degree formal, of its inconsistency with the Order of Her Majesty, by taking measures to procure the variation of that Order. They, therefore, proceed to consider first whether the conclusion is, in fact, correct.

The principal argument in support of it, which has been very ably put by the learned Counsel for the Respondent, is that on the death of a Hindoo owner of an undivided estate without preferable heirs, the whole inheritance descends to and vests in his widow; and that, although it be true that her power of disposition over it is qualified, and only valid against the heirs next in succession when exercised for certain purposes, or with their consent, yet if there be no such heirs it becomes absolute or, at all events, its exercise at her free will can be questioned by nobody. Her power of disposition was likened to that of the male owner of an undivided estate in that part of India in which the general Hindoo law obtains without qualification: he can dispose of that as he will if he has no adult sons, but if there be such sons their consent is necessary to render his disposition valid. The only difference between the two

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cases was said to be that in the one the right of objection was confined to sons or other direct descendants, in the other it was possessed by all collaterals capable of inheriting to the deceased husband of the widow.

It was justly observed in the course of the argument, with reference to those authorities which speak of the widow's interest as a life estate, that great confusion arises from applying analogies derived from the English law of real property to the Hindoo law of inheritance; and that when so applied the terms by which we describe estates in land under the *English* law are more likely to mislead than to direct the judgment aright. It may, however, be doubted whether the argument on behalf of the Respondent does not really require some such process of reasoning to support it. The Hindoo widow, it was urged, has an estate of inheritance, not a life estate; the original estate, it is said, devolves on her in a course of succession derived from the husband, who had in him an estate of inheritance, which she takes as heir. Yet what is this, in effect, but to apply the English law regulating the descent of lands in fee simple from ancestor to heir?

It is clear that under the Hindoo law the widow, though she takes as heir, takes a special and qualified estate. Compared with any estate that passes under the English law by inheritance, it is an anomalous estate. It is a qualified proprietorship, and it is only by the principles of the Hindoo law that the extent and nature of the qualification can be determined.

It is admitted, on all hands, that if there be collateral heirs of the husband, the widow cannot of her

own will alien the property except for special purposes. For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity. On the other hand, it may be taken as established that an alienation by her which would not otherwise be legitimate, may become so if made with the consent of her husband's kindred. But it surely is not the necessary or logical consequence of this latter proposition that in the absence of collateral heirs to the husband, or on their failure, the fetter on the widow's power of alienation altogether drops. The exception in favour of alienation with consent may be due to a presumption of law that where that consent is given the purpose for which the alienation is made must be proper.

Nor does it appear to their Lordships that the construction of Hindoo law which is now contended for, can be put upon the principle of "*cessante ratione cessat et ipsa lex.*" It is not merely for the protection of the material interests of her husband's relations that the fetter on the widow's power is imposed. Numberless authorities, from *Menu* downwards, may be cited to show that, according to the principles of Hindoo law, the proper state of every woman is one of tutelage; that they always require protection and are never fit for independence. Sir *Thomas Strange*. (See *Strange* on "Hindu Law," Vol. I. p. 242) cites the authority of *Menu* for the proposition that, if a woman have no other controller or protector, the King should control or protect her. Again, all the authorities concur in showing that, according to the

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principles of Hindoo law, the life of a widow is to be one of ascetic privation (2 *Colebrooke's* Dig., 459.) Hence, probably, it gave her a power of disposition for religious, which is denied to her for other, purposes. These principles do not seem to be consistent with the doctrine that, on the failure of heirs, a widow becomes completely emancipated; perfectly uncontrolled in the disposal of her property; and free to squander her inherited wealth for the purposes of selfish enjoyment.

Their Lordships cannot but think that, if the consequences of the failure of heirs of the husband were such as they are now argued to be, there would be some decisions on a case so likely to have happened before; or, at all events, that there would be some trace of so startling an exception to the general rule of Hindoo Law touching females taking by succession the property of males, in the ancient text-writers and commentators. The proposition, however, rests upon the argument founded on the nature of the Hindoo female's estate, as an estate of inheritance; upon a passage from a modern treatise by *Strange*, for which no authority is cited; and upon the opinion of the Pundits. The first, for the reasons already given, their Lordships consider unsatisfactory. The second cannot be treated as more than an opinion, though an opinion deserving of respect and attention. Upon the last, their Lordships can but repeat an observation made by them in the late case, *Myna Boyee v. Oottaram*, *ante*, p. 422, to the following effect:—Where an opinion apparently discordant from works of current and established authority is delivered by Pundits, it must not be taken on their authority to be a correct exposition of the law. They should be questioned further

as to authorities, usage, and generally-received opinions. Such an inquiry might produce a conviction that the Pundits on a new case delivered rather their own notions of expedient law, as law, than delivered it on the force of the opinions of any writers or authoritative expounders of the Hindoo Law.

Their Lordships are of opinion that the restrictions on a Hindoo Widow's power of alienation are inseparable from her estate, and that their existence does not depend on that of heirs capable of taking on her death. It follows that if, for want of heirs, the right to the property, so far as it has not been lawfully disposed of by her, passes to the Crown, the Crown must have the same power which an heir would have of protecting its interests by impeaching any unauthorized alienation by the widow.

Their Lordships, therefore, dissent from the first ground on which, by the judgment under appeal, the *Sudder Adawlut* has dismissed the Appellant's suit.

The next consideration is, whether the *Sudder Adawlut* was right in holding that the Crown is estopped by the act of the former Collector, Mr. Grant, from disputing the title asserted by the Respondent under the *Razeenamah*. In their Lordships' opinion the principles of estoppel do not support this contention. On every reasonable presumption the facts relating to the creation of the original debt were known to the Respondent, or to the original Plaintiff in the suit whose judgment he was enforcing. The Collector would have no necessary knowledge on the subject; nor is he proved to have had actual knowledge. His advice to the widow, to the effect that unless she made an arrangement with the creditor,

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the estate (which, the sale being an execution sale, must be taken to mean her right, title, and interest in the estate) would be sold, is not a statement at variance with the true state of things. The *Razee-namah* into which she entered, might, for aught that appeared, be satisfied by payment of the instalments in her lifetime. Again, the acts of a Government officer bind the Government only when he is acting in the discharge of a certain duty within the limits of his authority, or, if he exceed that authority, when the Government in fact, or in law, directly, or by implication, ratifies the excess. The Collector in this case had certainly no authority to waive the rights to which Government might become entitled by the escheat; nor were his acts, when fairly viewed calculated to give rise to the supposition that he had such an authority.

Their Lordships have already indicated their opinion that it is too late to assert, if it could ever have been successfully asserted, that it is not open to the Appellant on these pleadings to question the validity of the widow's alienation against the Crown. The reasoning of the *Sudder Adawlut* on this point seems to their Lordships to involve some misconception of the effect of the decree under which the Respondent claims. As regards the Appellant that decree is *res inter alios acta*. He is, therefore, in a very different position from one who, coming into Court to get rid of a decree binding upon him, has to allege and prove that it was fraudulently or collusively obtained, or is open to some other definite objection.

Again, though particular circumstances may shift the burthen of proof, the general rule certainly is, that it lies upon those who claim under an alienation

from a Hindoo female to show that the transaction was within her limited powers.

Their Lordships continue to think, that the evidence before them is not such as to admit of a satisfactory decision of the question whether the *Razeenamah* does to any and what extent constitute a charge on the *Zemindary* as against the Crown, and that there ought to be a further trial of that issue. Under the former Order of Her Maesty, the *Sudder Dewanny Adawlut* should have given to each party, if so disposed, an opportunity of adducing further evidence. It does not appear to have done this, but to have acted on its own impression that no further evidence was necessary. Such at least is their Lordships' understanding of the preliminary statements in the judgment under appeal.

In these circumstances their Lordships propose humbly to recommend to Her Majesty that the present appeal be allowed; that it be declared that the Crown, taking by escheat, has the same right to impeach the alienation by the widow which the next heirs of the husband (if such there had been) would have had, and is not estopped from asserting that right by the acts of the Collector in 1841; that the Crown is not bound by the decree; and that the widow was not entitled to alienate without the consent of the Crown, except in so far as she could have alienated without the consent of the next heirs of the husband, if such there had been, but that the Respondent is, at all events, entitled to a charge upon the estate, and to be paid and satisfied thereout, the full amount of all such of the advances, if any, made by the Respondent's father to the widow as were made for purposes for which, according to the Hindoo

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law, she would have been entitled to alienate the estate, as against the next heirs of her husband, if such there had been, in so far as she had not other estate of her husband to answer such purposes, and that the cause be remitted to the *Sudder Adawlut* to inquire whether, having regard to the declarations aforesaid, the right of the Crown was absolutely defeated by the *Razeenamah*, and if not to inquire what advances, if any, were made by the Respondent's father to the widow, and whether all or any, and which, of such advances, and to what amount, were made for purposes for which, according to the Hindoo law, the widow would have been entitled to alienate the estate as against the next heirs of her husband, if such there had been, and whether the widow had, when such advances were respectively made, other estates of her husband sufficient to answer such purposes; and the parties respectively are to be at liberty to adduce further evidence touching the matters aforesaid, or any of them, as they may be advised, and the *Sudder Court* is to proceed in the cause according to the result of the said inquiries.

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It is essential to an action in tort that the act complained of should be legally wrongful as regards the party complaining, i.e. it must prejudicially affect him in some legal right. The fact that it will, however directly, do him harm in his interests is not enough.

An order issued by the Superintendent of Marine, in his official capacity, to the *Bengal Pilot service*, employed by the East India Company on the *Hooghly River*,

prohibiting them from allowing a particular steam-tug to take any ship in tow of which such Pilots should have such pilotage charge, made in consequence of what the Superintendent deemed an exorbitant demand on the part of the owner of the steam-tug, whereby such owner was deprived for a time of the profits of being employed by the pilots in charge of ships going up or down the river *Hooghly*; in the absence of malice, alleged or to be inferred, is not such a wrong as would sustain an action by the owner of the tug against the Superintendent of Marine, the officer of the Government, issuing such order.

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2. *K.* being in urgent want of money entered into an agreement in writing with *N.*, acting as the agent of *F.*, for an advance of Rs. 19,000. The agreement recited that *N.* had undertaken to procure this amount from *F.*, on his return, he being then absent from the place where the agreement was executed, and *K.* promised, in consideration of the loan, to grant *N.* a lease of his *Zemindary*, and it was provided that *K.* should, on *F.*'s arrival, execute a regular deed. *N.* could only accommodate *K.* with a part of the proposed loan, and as the matter was urgent, and *F.*'s return was expected to be within a few days, it was verbally agreed, that the remaining portion of the loan should be advanced within eight days. *F.* did not return till nineteen days after, when he was willing to make the advance required; but in the interim, and after fifteen days from the date of the agreement, *K.*, from pressure for money had been obliged to get the advance from another party, and had, thereupon, granted him a lease of his *Zemindary*. *N.* then brought a suit for specific performance of the agreement. He afterwards died, when his heir assigned *N.*'s interest under the agreement to *F.*, who thereupon

brought an action against *K.* for breach of contract. The Civil Court awarded damages for the breach, but, upon appeal, the *Sudder* Court dismissed the suit, on the ground that the assignment by *N.*'s heir to *F.* was void for champerty.

Held: that as *N.* was only the agent of *F.*, the party really interested in the performance of the agreement, the assignment by his heir of his interest under the agreement, for the purpose of enabling *F.* to bring the suit, was not champerty or maintenance, as it was wholly unnecessary, as *F.* was suing in respect of his own interest for a breach of contract.

Held further, that as the agreement to grant the lease was incomplete in itself, and conditional upon the advance by *F.* within eight days, a delay of nineteen days, in the circumstances of the want of money by *K.* to meet his pressing demands, was an unreasonable delay, which defeated the object of the loan, and avoided the agreement to grant the lease. [*Fischer v. Kamala Naicker*] . . . 170

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An appeal was brought from part of a decree. At the hearing, held,

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The Appellants having waived the formality of lodging a cross appeal, the appeal was heard from the whole decree. [*Myna Boyee v. Ootaram*] - - - - - 400

3. A cross appeal from a decree of the *Sudder Dewanny* Court in India, although not interposed within the proper time, admitted upon conditions, (1) of the principal appeal being prosecuted; and (2) that the principal and cross appeal be heard on one printed case. [*Omanath Chowdry v. Sheikh Nujeeb Chowdry*] 498

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A decree of an appellate Court in India, obtained after a compromise, held, in the circumstances, fraudulent, and set aside with

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2. Pending the execution of decrees in suits between A., lessee, and B., under-lessee, for the balance of rent, C. purchased B.'s interest in the under-lease. For the protection of the property suits were then brought by C. against A. An *Ikrarnamah*, or agreement, was afterwards entered into by A. and C., to put an end to the litigation. This agreement recited that C. was indebted to A. in a certain sum which C. agreed to pay, upon a remission by A. of part of his claim, by two instalments at specified dates; and the agreement then provided that, if default was made by C. in paying the instalments, then that the remitted money was to be held due to A. by C., and secured upon certain property comprised in the under-lease, as well as by making C. himself liable. No place was specified, nor was there any custom established by the evidence, where the money was to be paid. The instalments were paid, but not until some time after the days specified in the agreement. The money had been tendered to A.'s *Mookhtar*, but refused by him from the fact of A. being absent, and also on the ground that interest was not tendered. A. afterwards brought an action against B. and C. to recover the sum remitted by the *Ikrarnamah*, on the ground that by the conditions of

that agreement, the instalments should have been punctually paid upon the specified days, which had not been done, nor had any legal tender been made. Held by the Judicial Committee (affirming the decree of the *Sudder Dewanny Adawlut*), (1) that although *A.* had agreed to remit part of his demand on condition of receiving payment on specified days, or in default that the remitted sum was to be paid, yet that there was nothing in the agreement which made the payment of the instalments on the days fixed, the essence of the contract, and that the Judicial Committee would not apply the technicalities of the English law with respect to breach of contracts to such an agreement; (2) that the penalty could not be enforced, as there was a *bona fide* endeavour to pay the money on the specified days; and (3) that the agreement was substantially performed by the payments, and that a strict legal tender was not necessary. [*Ram Gopal Mookerjee v. Masseyk*] - - - - - 239

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1. If both parties are dissatisfied with a decree of the Court below, a cross appeal is necessary.

An appeal was brought from part of a decree. At the hearing, held, that although the whole decree was not open to the Respondents, who had not appealed, yet, in the circumstances, leave to present a cross appeal ought to be permitted.

The Appellants having waived the formality of lodging a cross appeal, the appeal was heard from the whole decree. [*Myna Boyee v. Ootaram*] - - - 400

2. A cross appeal from a decree of the *Sudder Dewanny* Court in India, although not interposed within the proper time, admitted, upon conditions (1), of the principal appeal being prosecuted; and (2), that the principal and cross appeal be consolidated and heard on one printed case. [*Omanath Chowdry v. Sheikh Nujeeb Chowdry*] - - - 498

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A freehold interest cannot be created by parol or by an informal written instrument.

Disputes arose between the Indian Government and an adjacent proprietor, *M. S.*, respecting a piece of alluvial land gained by accretion, of which *M.S.* was then in possession. The Indian Government required the land for public improvements. After some correspondence between the Government and *M.S.*, an agreement was entered into, by which *M. S.* undertook to relinquish all claim to the proprietary right, and to rent the land from the Government, upon condition of the latter allowing him to remain in possession until the projected public improvements rendered it necessary for him to vacate the land. Possession was given to Government, *M.S.* holding the land from the Government at a fixed rent, and undertaking to quit possession at a month's notice. Improvements in the neighbourhood having been made by the Government, and *M.S.* being dead, notice to quit was served on *M.S.*'s representatives, who refused to quit, on the ground that the improvements were not such public improvements as were contemplated by the correspondence and agreement. In ejectment by the Government, held:—

First, that *M.S.* was, under the agreement, a mere tenant at will.

Second, that ejectment was maintainable by the Government for recovery of the land, and that M.S.'s representatives had no defence at law to the action.

Judgment of the Supreme Court affirmed, without prejudice to such equitable rights as M. S. might have under the correspondence and agreement. [*Sreemutty Anundomohey Dossee v. Doe dem. The East India Company*] - - - 43

EQUITABLE RELIEF.

Held, that if property said to have been concealed by a husband had been purchased by him out of moneys belonging to his wife's separate estate, which was clothed with a trust for the children of the marriage, the wife's remedy was, to enforce her own and children's rights by Bill, to compel a settlement of any property improperly withheld by the husband at the date of the execution of the agreement. [*Gregory v. Cochrane*] 275

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Semble. There is no distinction in this respect between Sacerdotal Brahmins and the ordinary members of that caste.

Where the Crown takes by escheat for want of heirs, it has the same right to impeach an unauthorized alienation by the widow, which the heirs of the husband, had there been any, would have had.

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Circumstances in which it was held that a Government Officer had no authority to waive the rights to

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Although the evidence of witnesses for the Defendants as to possession is of no better character than those produced by the Plaintiff as to disposition, yet it lies on the Plaintiff to make out his case, and, as the probabilities were against disposition, it was held by the Judicial Committee, affirming the judgment of the *Sudder Dewanny Adawlut*, that the Plaintiff had failed to prove the fact of the dispossession of the Defendants, which was necessary to maintain the suit. [*Maharajah Koowur Baboo Nitrasur Singh v. Baboo Nund Loll Singh*] 199

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Circumstances in which it was held that a Government Officer had no authority to waive the rights to which the Government might be entitled by escheat, and that a decree founded thereon by a Court in India did not operate as an estoppel against the Crown. [*The Collector of Masulipatam v. Cavalry Vencata Narrainapah.*] - - 529

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1. By the Hindoo law, no words of inheritance are necessary to pass the freehold of land to the heirs. [*Sreemutty Anundomohey Dossee v. Doe dem. The East India Company*] - - - - - 43

2. Although the Courts in India recognize the power of a Hindoo to make a Will, yet the extent of the power of disposition by a Testator is to be regulated by the Hindoo law, and cannot interfere with a widow's right to proper maintenance.

A gift to family idol upheld.

One of the sons of a Testator died, leaving three sons, one of whom also died without issue, leaving a widow. Held, that the direction contained in the Will that the property should go in the male line, did not exclude the widow of the grandson of the Testator, and that the widow was entitled to a third share of a fourth part of the property and accumulation, without prejudice to her rights as a Hindoo widow, when the property should be divided. [*Sonatum Bysack v. Sreemutty Juggutsoondree Dossee*]

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3. Where a party had agreed to remit part of his demand on condition of receiving payment on specified days, or in default that the remitted sum was to be paid, and there was nothing in the agreement which made the payment of the instalments on the days fixed

the essence of the contract, the Judicial Committee refused to apply the technicalities of the English law with respect to breach of contracts to such an agreement. [*Ram Gopal Mookerjee v. Masseyk*]

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4. *H.*, an Englishman, had five children by two native Hindoo women, one of whom was of the Brahmin caste, a married woman, though living apart from her husband. The five children were brought up as Hindoos, and lived together as a joint family. *H.* by his Will devised an estate to the five illegitimate children in equal shares: Held,

First, that the illegitimate children were to be considered as Hindoos, and their rights governed by that law;

Second, that being children of a Christian father by different Hindoo mothers, although constituting themselves co-parceners in the enjoyment of the property after the manner of a joint Hindoo family, yet that the partnership so constituted differed from the co-partnership of a joint Hindoo family as defined by the Hindoo law; and that, at the death of each son, his lineal heirs representing their parent would be entitled to enter into that partnership.

Quaere. Whether such right of inheritance enures to collaterals?

A suit was instituted by one of the illegitimate children against his

brothers for partition of the estate left them by H. A deed of *Razecnamah* was afterwards entered into by the parties, by which the shares and the amounts to be paid to each were ascertained, and provision made against alienation by sale, mortgage, lease, or security of any separate share. Held, that this deed did not affect the right which each co-sharer had to alienate by Will. [*Myna Boyee v. Ootaram*] 400

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Under the Imperial Statute, 11th & 12th Vict., c. 21, relating to Insolvent debtors in India, the Assignees have a right to subsequently-acquired property of an Insolvent, unless the Insolvent has obtained a certificate and discharge, but this title of the Assignees is subject to two qualifications—first, when the Insolvent has acquired property subject to liens and obligations; in such a case the property taken is subject to the equities and charges which affect it in the hands of the Insolvent; and, secondly, when the Insolvent carries on trade at a subsequent period, with the assent of the Assignees, the property which is acquired in the subsequent trade will be subject in equity to the charge of creditors in that trade, in priority to the claim of the Assignees.

An uncertificated Insolvent borrowed money for the purpose of purchasing goods to carry on a

business, and, in order to secure the advances made, gave a Bond and agreed, in writing, to execute a mortgage of the goods so purchased to the lender to secure repayment. He afterwards executed an assignment of the goods for that purpose. The business was carried on with the knowledge of, and without any objection by, the Official Assignee. The lender never had possession of the goods assigned to him by the Insolvent, and the same remained in possession of the Insolvent until his death. Held (reversing the decree of the Supreme Court at Madras), that the Insolvent's after-acquired property was subject to the lien of the lender, and that such lien was paramount to any claim of the Official Assignee under the insolvency. [*Kerakoose v. Brooks*] 339

INTEREST.

1. The purchaser was kept out of the annual payment for upwards of twenty years, the Government being in receipt of the *Toras garas*. Held further (in the absence of evidence that such annual payments had been paid into Court), that the purchaser was entitled to simple interest at the rate allowed by the Courts in India on the arrears due when the suit was brought, and on each subsequent payment when it accrued due. [*Sumbhoolall Girdhurlall v. The Collector of Surat*] 1

2. In calculating the appealable value, interest given by the decree is to be added to the principal. [*Maharajah Sutteeschunder Roy v. Guneschunder*] - - - - 164

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JURISDICTION.

A contract was entered into at *Rutlam*, in the independent State of *Malwa*, between the firm of *L.*, who resided and carried on business at *Muttra*, within the jurisdiction of the *Zillah* Court at *Agra*, and the firm of *Z.*, carrying on business at *Rutlam*, and elsewhere; for the establishment of a co-partnership for the purchase and sale of opium.

The co-partnership business was carried on principally at *Muttra*, and the business was conducted there by means of the capital advanced in the concern, by the firm of *L.*, in which place the partnership books were kept. At the close of the partnership, which was attended with loss, a balance was struck at *Muttra*, which showed a debt due by the firm of *Z.* to the firm of *L.* In an action brought by the firm of *L.* against the firm of *Z.* in the *Zillah* Court of *Agra*, for recovery of the amount of this balance, it was pleaded by *Z.* that as the contract was made at *Rutlam*, where the firm resided, the *Zillah* Court at *Agra* had, by *Ben. Reg. II.*, of 1803, no jurisdiction to entertain the action, which objection the *Zillah* Court allowed, and afterwards the *Sudder* Court at *Agra*, on appeal, sustained.

Upon appeal such decision was reversed by the Judicial Committee, on the ground that the cause of action arose in *Muttra*, and was, by *Ben. Reg. II.*, of 1803, within the jurisdiction of the *Zillah* Court of *Agra*.

First, because *Muttra* was the established place of business of the co-partnership, where the books were kept, for the purpose of the partners ascertaining the state of the transactions between them, and

Secondly, as it was there that the balance was struck, and payment of the balance due. [*Luckmee Chund v. Zorawur Mull*] - - 291

KISTBUNDY.

See "BOND," 2.

LACHES.

See "ACTION," 2.

"COSTS," 4.

"SALE," 1.

LEASE.

See "REGISTRATION."

"TENURE," 2.

LEAVE TO APPEAL.

See "APPEAL," 1.

"APPEALABLE VALUE."

LEGITIMACY.

See "MAHOMEDAN LAW," 1.

LEX LOCI CONTRACTUS.

See "JURISDICTION."

LIEN,

Of creditor.

See "INSOLVENT."

LIMITATION OF SUITS.

1. Decrees were made in the year 1816, in suits respecting boundaries of certain *Mouzahs* in two

Zemindaries, and the boundary line determined. In 1845 a suit was brought by the representatives of one of the parties in the above suits to recover land alleged to be part of one of these *Mouzahs*, which land it was admitted by the Plaintiff that the Defendants had been in possession of since the year 1834. It was pleaded in defence, first, that the land claimed was within the boundary declared by the decrees of 1816 to belong to the Defendants; and, secondly, that the Plaintiff, or those under whom he claimed, had been in possession for upwards of twelve years, and that the cause of action was consequently barred by *Ben. Reg. III. of 1793, sec. 16*. In such circumstances it was held that the issue of possession was the first point to be considered, and that such issue was wholly independent of the question of boundary.

Held further, that as the Plaintiff sought to disturb the possession of the Defendants, admitted by him to have existed for eleven years, but which the Defendants alleged was a much longer period, the *onus probandi* was upon the Plaintiff, to remove the bar to the action by *Ben. Reg. III. of 1793, sec. 16*, by satisfactory proof that the cause of action accrued to him on a dispossession, twelve years before the commencement of the suit, and that he, or some person through whom he claimed, was in possession during that period; and that no proof of anterior title in his

favour, such as would be involved in the boundary question, could relieve him from this *onus*, or shift the *onus* on the Defendants, by compelling them to prove the time and manner of possession.

Although the evidence of witnesses for the Defendants as to possession is of no better character than those produced by the Plaintiff as to dispossession, yet it lies on the Plaintiff to make out his case; and as the probabilities of the case in this instance were against dispossession, it was held by the Judicial Committee, affirming the judgment of the *Sudder Dewanny Adawlut*, that the Plaintiff had failed to prove the dispossession of the Defendants, which was necessary to maintain the suit. [*Maharajah Koowur Baboo Nitrasur Singh v. Baboo Loll Singh*] 199

2. Under the provisions of the Statute, 3rd & 4th Will. IV., c. 41, and the Order in Council of the 4th September, 1833, an appeal from the *Sudder Court* in India was brought to a hearing by the East India Company, before the Judicial Committee of the Privy Council, and, by an Order in Council made on the appeal in 1836, the costs incurred in prosecuting the appeal were directed to be paid to the East India Company by the respective parties to the appeal, or their representatives, as provided by the Order in Council of the 18th of November, 1833. On a suit brought by the Government

in 1852, against the representatives of one of the parties to the appeal, to recover part of the costs incurred by the East India Company in bringing the appeal to a hearing. Held,

First, that the recovery of the costs incurred by the East India Company, being in the character of agents to prosecute the dormant appeal, under the Statute, 3rd & 4th Will. IV., c. 41, sec. 22, and Order in Council of the 4th of September, 1833, did not constitute a "public right" within the provisions of cl. 2, sec. 2, of *Ben. Reg. II.* of 1805, which gives the Government a period of sixty years for bringing a suit; and,

Secondly, that the claim was barred by sec. 14 of *Ben. Reg. III.* of 1793, and the Court in India prohibited from entertaining the suit, as it had not been brought within twelve years, the time limited by that Regulation. [*The Government of Bengal v. Mussumat Shurruffutoonnissa*] 225

3. A suit was instituted in 1827 by *A.* against *B.*, to recover a moiety of real estate in the possession of *B.* In the year 1829 the suit was compromised and a partition agreed upon. The *Raseenamah*, or deed of compromise, provided that, in the event of either of the parties not agreeing to act according to the terms of the compromise, the Court was to enforce the same. *B.* refused to carry out the agreement, and *A.* applied to the Court to

enforce the compromise; the *Sudder* Court in 1832 confirmed the agreement, and ordered possession to be given to *A.*, directing the suit to be struck off the file. No directions were given by the order of the Court respecting the mesne profits. In the same year *A.* presented a petition to the *Sudder* Court, founded on the order for possession, for *Wasilat* or mesne profits of his share of the real estate. This petition came before a single Judge of the *Sudder* Court, who made an order awarding *Wasilat* from the date of the decision of the Court to the date of possession. This order was appealed from, and, in the year 1833, the *Sudder* Court held that the order of a single Judge decreeing *Wasilat* was *ultra vires*. In consequence of this decision, *A.* brought a regular suit against *B.* for *Wasilat*. In defence it was pleaded that the Plaintiff's claim was barred by *Ben. Reg. III.* of 1793, sec. 14, as the mesne profits claimed accrued beyond twelve years from the date of the institution of the suit. The *Sudder* Court decided, that, in the circumstances, the Regulation did not apply. Such decree affirmed on appeal, by the Judicial Committee of the Privy Council, by reason—

First, that the cause of action did not arise upon the suit instituted in 1827, or upon the agreement to compromise; and

Secondly, that the conduct and acts of *A.*, from the date of the Order

striking the cause off the file of the *Sudder Court*, in endeavouring to recover the *Wasilat*, showed an intention to carry out the compromise, and the proceedings before the Court to recover the same took the case out of the operation of *Ben. Reg. III. of 1793, sec. 14.* [*Doorgapersaud Roy Chowdry v. Tarapersaud Roy Chowdry*] - 308

MAHOMEDAN LAW.

1. By the Mahomedan law, the legitimacy of a child of Mahomedan parents may be presumed, or inferred from circumstances, without any direct proof either of a marriage between the parents, or of any formal act of legitimation.

In the absence of evidence or circumstances sufficient to found such a presumption or inference, a claim by a party, as a legitimate son, to share in an intestate's estate, dismissed. [*Mahomed Bauker Hoosain Khan Bahadoor v. Shurfoon Nissa Begum*] - - - 136

2. Provision is made by the Mahomedan law for divorce in either of the two forms. First, *Talak*, and secondly, *Khoola*.

A divorce by *Talak* is the mere arbitrary act of the husband, who may repudiate his wife with or without cause; but in a divorce of that kind the husband is liable to repay *dyn-mohr*, or the wife's dower, and

Semble, also to give up her jewels and paraphernalia.

A *Khoola* divorce is with the consent and at the instance of the wife, for which she gives a consideration to her husband for release of the marriage tie.

Non-payment of the consideration-money by the wife does not invalidate such a divorce.

Divorce by *Talak* is not complete and irrevocable by the single declaration of the husband, but a *Khoola* divorce is at once complete and irrevocable from the moment the husband repudiates the wife, and a separation takes place.

Suit by divorced wife against her husband to recover her *dyn-mohr* on the allegation that her husband had dissolved the marriage "by divorcing her," and had obtained from her by force and duress two instruments, first, an *Ibranamah*, or release of her *dyn-mohr*, and secondly, a *Khoolanamah*, or deed securing her husband the stipulated consideration to be paid by a wife in a case of *Khoola* divorce. In his answer, the husband denied that a *Talak* divorce had taken place, and in order to bar her claim to dower upon that form of divorce, set up the *Ibranamah* and *Khoolanamah*. Held,

First, that as it appeared from the evidence that the deeds were obtained by force and duress, they could not be supported; and

Secondly, that upon the admission in the answer of a divorce it must be

presumed as a fact, that a divorce of some kind had taken place, and that in the circumstances it was a *Talak* and not a *Khoola* divorce, according to which the divorced wife was entitled to recover her *dyn-mohr*. [*Moonshee Bapul-ul-Raheem v. Luteefut-oon-Nissa*] 379

MAINTENANCE

Of Hindoo widow.

.. See "HINDOO LAW," 2.

MALE HEIRS.

See "ESCHEAT."

"WILL," 1.

MALICE.

See "ACTION," 1.

MANAGER.

1. A bond, executed by a Hindoo widow and guardian of an adopted son, during his minority, the object of which was, first, to pay off a debt due by her deceased husband, charged upon the *Zemindary*, and next to discharge certain debts contracted by her in the management of the *Zemindary*, the validity of which was recognized by the adopted son after he became of age, upheld: without determining the question raised of the power of a Hindoo widow, as

guardian of a minor, to create a charge on the *Zemindary* during the minority of her adopted son. [*Chetty Colum Comara Vencatachella Reddyer v. Rungasawmy Streemunth Jyengar Bahadoor*]

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2. A Hindoo Testator, by his Will, empowered his Executor and guardian of his infant children, who was also manager of his *Zemindary*, to charge the same for payment of debts and advances during his children's minority, and directed that when the children came of age they should repay the amount raised. The Executor borrowed of a banking firm money for payment of Government revenue, and gave Bonds charging the *Zemindary* with the sums so borrowed. On the children coming of age they executed a *Kistbundy*, for repayment by instalments of the amount then due. This instrument they afterwards repudiated, and on a suit being brought against them by the lender upon the *Kistbundy*, in defence they not only denied the existence of the Bond, but charged the lender with fraudulently colluding with the Executor in obtaining the loan, and granting a lease to a nominee of the lender at an inadequate rent. Held,—

First, that the Executor had power under the Will to charge the *Zemindary* with advances made for the purposes of the *Zemindary*.

Secondly, that, as a question of fact, the *Kistbundy* was established,

Thirdly, that the remedy of the Defendants was to have instituted a suit against their guardian for an account, charging collusion between him and the lender, so as to investigate the transactions which had taken place, and ascertain what was the amount due. [*Golaub Koonwurree Bebee v. Eshan Chunder Chowdhoree*] - - 447

MARRIAGE.

See "MAHOMEDAN LAW," 1.

MILITARY SERVICES.

See "TENURE," 2.

NEW TRIAL.

A preliminary objection was taken in the *Sudder* Court to a decree of the Principal *Sudder Ameen*, on the ground that the *Sudder Ameen* had omitted to draw up the issues in the suit as required by sec. 10 of *Ben. Reg. XXVI.* of 1814. This objection was held fatal, and the *Sudder* Court remitted the suit to the Lower Court with directions to lay down the suit in a regular way, and to try and determine the suit *de novo*. The Principal *Sudder Ameen* accordingly prepared the proper issues, and ordered that the parties should be called upon for their proofs. The Plaintiff did not go into fresh evidence, but prayed

for judgment on the evidence already given, and upon the former evidence taken the Principal *Sudder Ameen* made a decree against the Plaintiff.

Held upon appeal by the Judicial Committee,—

First, that if this mode of trial was irregular, the Plaintiff had no just ground of complaint, as the irregularity was committed at his instance, or with his consent.

Second, that a suspicion, however probable, in the mind of a Judge that a party who has failed to prove his case, might be more successful on a fuller investigation, does not constitute a sufficient ground for directing a new trial. [*Maharajah Koowur Baboo Nitrasur Singh v. Baboo Nund Loll Singh*] - - - - - 199

ONUS PROBANDI.

See "EVIDENCE."

"LIMITATION OF SUITS," 1.

OPINIONS

1. Of Native law Officers upon reference by the Court, necessity of being clear and specific. [*Myna Boyce v. Ootaram*] - - - - 400
2. The rule laid down in the case of *Myna Boyce v. Ootaram*, ante, p. 400, that an opinion of the Pundits apparently discordant from works of current and established authority upon Hindoo law, given in the absence of authorities or

of local usage, is not to be received as conclusive upon the question at issue, approved of. [*The Collector of Masulipatam v. Cavalv Vencata Narrainapah*] 529
See "REFERENCE TO NATIVE LAW OFFICERS."

ORDERS IN COUNCIL,

Of the 4th September, 1833, respecting dormant appeals taken up by the East India Company.
See "LIMITATION OF SUITS," 2.
Of the 10th of April, 1838, respecting appealable value.
See "APPEALABLE VALUE," *passim*.
"COSTS," 6.
Of the 13th June, 1853, respecting dismissal of appeal for want of prosecution.
See "PRACTICE," 4.

OUDE.

See "APPEAL," 1.

PARTNERSHIP.

Business carried on in different countries. Action brought where balance struck. [*Luckmee Chund v. Zorawur Mull*] - - - 291
See "JURISDICTION."

PATERNAL PROPERTY.

See "ANCESTRAL PROPERTY."

PAYMENT,

By instalments on specified dates, or in default the remitted money to be paid, what amount to default. [*Ram Gopal Mookerjee v. Massyk*] - - - - - 239

PLEADINGS.

1. The *Sudder Dewanny Adawlut*, at Madras, dismissed a suit on the ground that the facts disclosed a case of champerty; a question not raised by the pleadings, or in the Court below. Held by the Judicial Committee, that as that objection was not raised, or the points recorded by the Court, as required by Madras Reg. XV. of 1816, sec. 10, cl. 3, the dismissal upon such ground could not be maintained, as the objection, founded upon the English doctrine of champerty, ought not to be noticed by the Court upon a mere inference arising incidentally from the evidence in the suit. [*Fischer v. Kamala Naicker*] - - - 170
2. Effect of pleading a divorce by *Khola* to a suit by a wife for her dower where a *Talak* divorce was established. [*Moonshee Buzul-ul-Raheem v. Luteefut-oon-Nissa*] 379

POINTS

RECORDED BY THE COURT.

1. The sitting Judge upon an appeal,

acting under the Act, No. III. of 1843, then in force, amended the certificate of the points at issue in the proceedings before the *Zillah Judge* by adding further points. Upon the proceedings coming before the full Court of the *Sudder Dewanny Adawlut*, that Court ordered the certificate to be further amended. After these proceedings had taken place, Act, No. XVI. of 1853, was passed, whereby the Act, No. III. of 1843, relating to special appeals, was repealed. By section 3 of the Act, No. XVI. of 1853, power was given to the *Sudder Dewanny Adawlut* to determine appeals without reference to the points certified. Held, that under that Act, the whole subject at issue at the last hearing upon appeal was open to the *Sudder Court's* consideration. [*Sumbhoolall Girdhurlall v. The Collector of Surat*] - 1

2. The *Sudder Dewanny Adawlut* at *Madras*, dismissed a suit on the ground, that the facts disclosed a case of champerty; a question not raised by the pleadings, or in the Court below. Held by the Judicial Committee, that as that objection was not raised, or the points recorded by the Court, as required by *Madras Reg. XV. of 1816*, sec. 10, cl. 3, the dismissal upon such ground could not be maintained, as the objection founded upon the English doctrine of champerty, ought not to be noticed by the Court upon a mere inference arising incidentally from the evi-

dence in the suit. [*Fischer v. Kamala Naicker*] - - - 170

3. A preliminary objection was taken in the *Sudder Court* to a decree of the Principal *Sudder Ameen*, on the ground that the *Sudder Ameen* had omitted to draw up the issues in the suit as required by sec. 10 of *Ben. Reg. XXVI. of 1814*. This objection was held fatal, and the *Sudder Court* remitted the suit to the Lower Court, with directions to lay down the issues in a regular way, and to try and determine the suit *de novo*. [*Maharajah Koowur Baboo Nitrasur Singh v. Baboo Nund Loll Singh*] - - - 199

See "NEW TRIAL."

POSSESSION.

- A decretal order directed possession only. A single Judge held not competent to make a supplemental order thereon giving *Wasilat*. [*Doorgapersaud Roy Chowdry v. Tarapersaud Roy Chowdry*] 308

PRACTICE.

1. Costs both in England and India given upon a reversal of an appeal. [*Sumbhoolall Girdhurlall v. The Collector of Surat*] - - - 1
2. Judgment of the Court below affirmed, without prejudice to equitable rights. [*Sreemutty Anundomohey Dossee v. Doe dem. The East India Company*] - - - 43

3. In an action the Court at *Calcutta* gave damages, the amount of which was under the appealable value prescribed by the *Calcutta* charter. As an important point of law was involved, special leave to appeal was upon petition granted. [*Rogers v. Rajendra Dutt*] - - - 103

4. Appeal dismissed for want of prosecution, under Rule V. of the Order in Council of the 13th of June, 1853, restored, under circumstances showing that the interest of infants was materially affected; but upon condition, that the appeal should be prosecuted within a given time.

The security entered into in the *Sudder* Court for the costs of appeal to *England* is vacated by the dismissal consequent upon non-prosecution of the appeal within the prescribed time.

When an appeal is restored fresh security will be required to be deposited in *England*. [*Ranee Birjobuttee v. Pertaub Sing*] - 160

5. By a decree of the *Sudder* Court the principal sum decreed was under Rs. 10,000, but the Court also decreed interest. Held, that in calculating the appealable value, interest was to be added to the principal. [*Maharajah Sutteeschunder Roy v. Guncschunder*] 164

6. An estate, the subject of the suit, was charged with a fixed annual quit-rent of Rs. 64, which the *Sudder* Court decreed with a de-

claration of the right of the Plaintiff to an enhanced rent of Rs. 822. 13a. Held, that the value of the subject-matter in suit, in the circumstances, ought to be estimated as amounting to Rs. 10,000, and, upon special petition, leave to appeal granted. [*Sree Mutty Rance Surnomoyee v. Maharajah Sutteeschunder Roy*] 165

7. Mode of estimating the appealable value. Interest given by decree to be added to the principal.

Whether interest subsequent to the date of the decree can be added, is a question for the discretion of the Judicial Committee. [*Gooroopersad Khoond v. Juggutchunder*] - 166

8. Where an appeal was affirmed upon wholly different grounds from those relied upon by the Court below, the dismissal was ordered to be without costs. [*Fischer v. Kamala Naicker*] 170

9. An Order in Council, made upon an *ex-parte* application granting special leave to appeal upon an allegation as to the value of the property in dispute rescinded, there being omissions in the petition of proceedings in the suit, which showed the true value of the property.

In ordinary circumstances an Order in Council obtained upon an *ex-parte* petition, which omitted to state the true facts, will be discharged with costs; but if there has been laches in applying to dis-

- charge the Order on the part of the Respondent, no costs will be given. [*Mohun Lall Sookul v. Bebee Doss*] - - - 193
10. The Respondents appeared by Counsel at the hearing to argue the appeal, without having lodged a printed case. Their Lordships refused to hear the appeal until a printed case was lodged. [*The Government of Bengal v. Mussumat Shurruffutoonnissa*] - - - 225
11. No provision by Statute, or Charter, being made for appeals to Her Majesty in Council from judgments of the Court of the Judicial Commissioner of *Oude*, created on the annexation of that Kingdom in the year 1858, the Judicial Committee, to prevent the denial of justice, admitted an appeal, under Statute, 3rd & 4th Will. IV., c. 41, sec. 4. [*Salik Ram v. Azim Ali Beg*] 270
12. If both parties are dissatisfied with a decree of the Court below, a cross appeal is necessary.
- An appeal was brought from part of a decree. At the hearing, held, that although the whole decree was not open to the Respondents, who had not appealed, yet, in the circumstances, leave to present a cross appeal ought to be permitted.
- The Appellants having waived the formality of lodging a cross appeal, the appeal was heard from the whole decree. [*Myna Boyee v. Ootaram*] - - - 400
13. It is the practice of the Judicial

- Committee, in a case of disputed fact, when the Courts in India appear to have diligently investigated the evidence, and no palpable mistake is apparent in the appreciation by the Court below of such evidence, to affirm the decree appealed from with costs. [*Chundermonee Debia Chowdhoorayn v. Munmoheene Debia*] - - 477
14. Upon evidence taken in India of the value of the property in dispute, an Order in Council, which rescinded a previous Order allowing special leave to appeal on the allegation of the suppression of material facts as to the value, discharged and the appeal restored. [*Mohun Lall Sookul v. Bebee Doss*] - 492
15. A cross appeal from a decree of the *Sudder Dewanny* Court in India, although not interposed within the proper time, admitted, upon conditions (1), of the principal appeal being prosecuted; and (2), that the principal and cross appeals be consolidated and heard on one printed case. [*Omanath Chowdry v. Sheikh Nujeeb Chowdry*] - - - 498

PRESUMPTION

Of legitimacy.

See "MAHOMEDAN LAW," 1.

PRINTED CASE.

See "PRACTICE," 10.

PUBLICATION

Of notice of execution sale required by *Ben. Reg. XLV. of 1793*, sec. 12, posted at the house of the judgment debtor, though not within the ambit of the *Pergunnah* in which the land to be sold was situate, held sufficient. [*Lamb v. Bejoy Kishen Dass*] - - - 427

See "SALE," 1.

PUBLIC POLICY.

Alienation of *Tora garas* is not against public policy. [*Sumbhoolall Girdhurlall v. The Collector of Surat*] - - - - - 1

See "CHAMPERTY AND MAINTENANCE."

"REGISTRATION."

"TENURE," 1.

PURCHASER,

Under execution sale in satisfaction of decree.

See "SALE," 1.

"TENURE," 1.

PUTNEE TALOOK.

See "SALE," 2.

RATIFICATION.

See "GOVERNMENT OFFICER."

"MANAGER."

RAZEENAMAH.

See "COMPROMISE."

"HINDOO LAW," 4.

"LIMITATION OF SUITS," 3.

REFERENCE

To the Native Law Officers of the Court.

Where a reference is made by the Court to the Native Law Officers for an opinion upon a question which arises in a suit before the Court, the answer to which may bind a right, the question submitted should embrace all the important facts proved or admitted in the suit, which may affect the conclusion; and it is the duty of the Court itself so to frame the question, that the Court may elicit an opinion upon the very facts upon which the legal title depends. If the facts be not ascertained, but stated and disputed, then the question should embrace either view of the facts.

When the opinion given is apparently irreconcilable with the opinions of approved text-writers on the Hindoo Law, those who give the opinion should be asked to explain that which appears, *prima facie*, irreconcilable; so that they may show on what ground an apparent exemption from the general law is inferred; whether on general custom, modifying texts, on local usage, family customs, or other

exceptional matter. [*Myna Boyce*
v. *Ootaram*] - - - - 400

See "OPINION."

REGISTRATION.

A perpetual lease of a distinct portion of a *Zemindary* is not within the provisions of section 8 of *Mad. Reg. XXV.* of 1802, and does not require registration, as it is not a "sale, gift, or transfer" of the whole or any portion of the *Zemindary*.

Scmble. That section applies only to questions between the *Zemindar* and the Government, with a view to prevent a severance of the *Zemindary* without public notice to the Government. [*Vencataswara Yettiapah Naicker* v. *Alagoo Moottoo Servagaren*] - - - - 327

RESTORATION

Of appeal.

See "PRACTICE," 4, 14.

RESULTING TRUST.

See "ESCHEAT."

RUFFANAMAH.

See "COMPROMISE," 1.

SALE.

1. A suit was brought in 1852, to set aside an execution sale made in 1841, on the ground of irregularity

in not complying with the provisions of *Ben. Reg. XLV.*, sec. 12, of 1793, for the due publication of the sale. A summary suit, under *Ben. Reg. VII.*, of 1825, sec. 5, had been brought shortly after the date of the sale by the judgment debtor, to set it aside, on the ground of inadequacy of the purchase-money, which suit was dismissed. There was no allegation in that suit of any irregularity in the publication of sale. It appeared from the evidence in the suit of 1852, that the notice of sale was affixed at the dwelling-house of the judgment debtor, the place where his rents were paid, but which was not part of the estate sold. It was not pleaded in the suit of 1852, that there was a town or village where the notification could be fixed as required by sec. 12, *Ben. Reg. XLV.*, of 1793. The *Sudder Dewanny* Court held, that there had been an irregularity in the publication of the notice of sale, as it was not made within the ambit of the estate sold, and set the sale aside on that ground. Upon appeal, held by the Judicial Committee, reversing such decree, First, that, as it did not appear that there was any town or village within the *Pergunnah* at which the notification required by the provisions of *Ben. Reg. XLV.*, sec. 12, of 1793, could be affixed, there had been no irregularity in posting the notice at the house of the judgment debtor, so as to vitiate the sale, and,

Secondly, that, even if there had been an informality in that respect, it ought to have been objected to in the summary suit brought in 1841, and could not be opened eleven years afterwards. [*Lamb v. Bejoy Kishen Dass*] 427

2. Suit to set aside a sale of *Putnee Talooks*, for arrears of rent, on the ground of an irregularity in the proclamation of sale, as the lease was alleged to be held by the lessee in *Benamce*, and that the proper party's name did not appear, dismissed, the *Ikrarnamah* creating the alleged trust being declared a forgery. [*Mussumat Kripomoye Debia v. Gerischunder Lahore*] - - - - - 467

See "REGISTRATION."

"TENURE," 1.

SECURITY.

For costs of appeal.

See "PRACTICE," 4.

SPECIAL APPEAL.

1. Although the amount at issue was under Rs. 5,000, the appealable value, a special appeal was, in circumstances, admitted by the *Sudder Dewanny Adawlut* from a decree of the *Zillah Court*. [*Sumbhoolall Girdhurlall v. The Collector of Surat*] - - - - - 1
2. From the Judicial Commissioner of *Oude*, allowed under Statute,

3rd & 4th Will. IV., c. 41, sec. 4.
[*Salik Ram v. Azim Ali Beg*, 270;
and *Nowab Tajdur Bohoo v. Mirza Jchan*] - - - - - 274

See "PRACTICE," 3, 6, 9, 11.

SPECIFIC PERFORMANCE.

See "FAMILY ARRANGEMENT."

STAMP DUTIES.

The provisions of *Ben. Reg. X.*, of 1829, imposing a stamp duty upon plaints in respect of the value of the subject-matter sued for, should be strictly attended to by the Courts in India. [*Mohun Lall Sookull v. Debee Doss*] - - 492

SUBSEQUENT ACQUIRED PROPERTY.

See "INSOLVENT."

SUMMARY SUIT,

Under *Ben. Reg. VII.* of 1825, sec. 5, to set aside a sale by a judgment creditor, for inadequacy of price. [*Lamb v. Bejoy Kishen Dass*] 427

See "SALE," 1.

TENDER.

See "COMPROMISE," 2.

TENURE.

1. *Tora garas*, an annual fixed money payment in the nature of black mail, is alienable, and subject to sale or mortgage like other property.

Under an execution sale in satisfaction of a decree, *Tora garas* was sold. The purchaser paid the money into Court, which was paid out to the judgment creditor, and the purchaser had a conveyance of the *Toras garas* executed by the Court. The Government in the first instance acquiesced in the sale, but afterwards refused to register the name of the purchaser in their books as aliened, on the ground that *Tora garas* was, from its nature and on public policy, inalienable; nevertheless, they received and applied the accruing payments to their own use. In a suit brought by the purchaser against the Government and the judgment creditor, the *Sudder* Court, in the first place, held the sale illegal, on the ground of the inalienable character of *Toras garas*; and, secondly, acting upon the maxim "*caveat emptor*," refused to order the judgment creditor to return the purchase-money. Upon appeal, such decree reversed by the Judicial Committee, by reason,—

First, that *Tora garas* was alienable, and capable of being attached and sold in satisfaction of a decree; and,

Secondly, that the decree was erro-

neous, as it would be manifestly unjust to deprive the purchaser of the purchase-money in the event of the sale being treated as a nullity. [*Sumbhoolall Girdhurlall v. The Collector of Surat*] - - 1

2. A *Cuttoogootaga* tenure (perpetual lease at a low fixed rent payable to the *Zemindar*, granted in consideration of military services performed by the ancestors of the grantee) of a distinct part of a *Zemindary* in *Madras*, upheld.

Such lease held not to require registration. [*Vencataswara Yettiapah Naicker v. Alagoo Moottoo Servagaren*] - - - - - 327

See "REGISTRATION."

TIME,

In an agreement for loan, considered as the essence of the contract.

See "ACTION," 2.

"COMPROMISE," 2.

TITLE.

See "TENURE."

TORA GARAS HUK.

See "TENURE," 1.

TORT.

See "ACTION," 1.

TRUST.

See "ESCHEAT."

ULTRA VIRES.

See "GOVERNMENT OFFICER."

UNCERTIFICATED INSOLVENT.

Effect of subsequent acquired property when the business was carried on with the knowledge of the Official Assignee. [*Kerakoose v. Brooks*] - - - - - 339

See "INSOLVENT."

WASILAT.

A single Judge of the *Sudder Court* is not competent to make a supplemental order for *Wasilat*, upon a decretal order of the Court merely decreeing possession. [*Doorgapersaud Roy Chowdry v. Terapersaud Roy Chowdry*] - - - - - 308

WIDOW.

1. By the Hindoo law a Testator cannot by Will interfere with a widow's right to a proper maintenance. [*Sonatun Bysack v. Sreemutty Juggutsoondree Dossee*] 66

See "WILL," 1.

2. Widow and manager's power to create a charge upon the Zemin-dary during the minority of the heir. [*Chetty Colum Comara Vencatachella Reddyer v. Rajah Run-gasawmy Streemunth Jyengar Bahadoor*] - - - - - 319

See "MANAGER," 1.

3. By the Hindoo law of inheritance a

childless widow takes as heir, but it is a special and qualified estate only. If there be collateral heirs of the husband the widow cannot alien the property, except for special purposes, such as for religious or charitable objects, or those acts which are supposed to conduce to the spiritual welfare of the husband, in which circumstances she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the latter purpose, she must show actual necessity.

The restrictions imposed by the Hindoo law on a widow's power of alienation of her husband's estate are inseparable from her estate, and do not depend on the existence of heirs taking at her death. Where the Crown takes by escheat for want of heirs, it has the same right to impeach an unauthorized alienation by the widow which the heirs of the husband, had there been any, would have had. [*The Collector of Masulipatam v. Cavalv Vencata Narrainapah*] - 529

WIFE'S

Separate estate.

See "EQUITABLE RELIEF."

WILL.

1. Although the Courts in India recognize the power of a Hindoo to make a Will, yet the extent of the power of disposition by a Testator is to be regulated by the Hindoo

law, and cannot interfere with a widow's right to a proper maintenance.

A Hindoo, by Will, gave all his moveable and immoveable property to his family idol; and after stating that he had four sons, he directed that his property should never be divided by them, their sons, or grandsons in succession, but that they should enjoy "the surplus proceeds only"; and the Will, after appointing one of the sons manager to the estate, to attend to the festivals and ceremonies of the idol and maintain the family, further directed that, whatever might be the surplus, after deducting the whole of the expenditure, the same should be added to the corpus, and in the event of a disagreement between the sons and family, the Testator directed that, after the expenses attending the estate, the idol, and maintenance of the members of the family, whatever nett produce and surplus there might be, should be divided annually in certain proportions among the members of the family. At the date of the Will the family were joint in estate, food, and worship. The accumulations of the income were divided as directed by the Will. Held,—

First, that the bequest to the idol was not an absolute gift, but was to be construed as a gift to the Testator's four sons and their off-

spring in the male line, as a joint family, so long as the family remained joint, and that the four sons were entitled to the surplus of the property, after providing for the performance of the ceremonies and festivals of the idol, and the provisions in the Will for maintenance.

Second, that the fact of the division of the income arising out of the Testator's estate among the members of the family after the Testator's death did not constitute a division of the family. [*Sonatun Bysack v. Sreemutty Juggutsoondree Dossee*] - - - - - 66

2. Power by a Hindu to alienate by Will. [*Myna Boyee v. Ootaram*] 400

3. An Executor under a Will of a Hindoo Testator held to have power to charge a *Zemindary* with advances made for the purposes of the *Zemindary*. [*Golaub Koonwurree Bebee v. Eshan Chunder Chowdhoree*] - - - - - 447

ZEMINDARY.

1. Power of Hindoo widow to charge for debts. [*Chetty Colum Comara Vencatachella Reddyer v. Rajah Rungasawmy Jyengar Bahadoor*] 319

2. Power of manager to charge under authority contained in a Will of a Hindoo Testator. [*Golaub Koonwurree Bebee v. Eshan Chunder Chowdhoree*] - - - - - 447

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